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CASES

ON

MARRIAGE AND DIVORCE

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

BY

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PART IV

OF

KALES' CASES ON PERSONS AND DOMESTIC RELATIONS

AMERICAN CASEBOOK SERIES

JAMES BROWN SCOTT
GENERAL EDITOR

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THE AMERICAN CASEBOOK SERIES

For years past the science of law has been taught by lectures, the use of text-books and more recently by the detailed study, in the class-room, of selected cases.

Each method has its advocates, but it is generally agreed that the lecture system should be discarded because in it the lecturer does the work and the student is either a willing receptacle or offers a passive resistance. It is not too much to say that the lecture system is doomed.

Instruction by the means of text-books as a supplement or substitute for the formal lecture has made its formal entry into the educational world and obtains widely; but the system is faulty and must pass away as the exclusive means of studying and teaching law. It is an improvement on the formal lecture in that the student works, but if it cannot be said that he works to no purpose, it is a fact that he works from the wrong end. The rule is learned without the reason, or both rule and reason are stated in the abstract as the resultant rather than as the process. If we forget the rule we cannot solve the problem; if we have learned to solve the problem it is a simple matter to formulate a rule of our own. The text-book method may strengthen the memory; it may not train the mind, nor does it necessarily strengthen it. A text, if it be short, is at best a summary, and a summary presupposes previous knowledge.

If, however, law be considered as a science rather than a collection of arbitrary rules and regulations, it follows that it should be studied as a science. Thus to state the problem is to solve it; the laboratory method has displaced the lecture, and the text yields to the actual experiment. The law reports are in more senses than one books of experiments, and, by studying the actual case, the student co-operates with the judge and works out the conclusion however complicated the facts or the principles involved. A study of cases arranged historically develops the knowledge of the law, and each case is seen to be not an isolated fact but a necessary link in the chain of development. The study of the case is clearly the most practical method, for the student already does in his undergraduate days what he must do all his life; it is curiously the most theoretical and the most practical. For a discussion of the case in all its parts develops analysis, the comparison of many cases establishes a general principle, and

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the arrangement and classification of principles dealing with a subject make the law on that subject.

In this way TRAINING AND KNOWLEDGE, the means and the end of legal study, go hand and hand.

The obvious advantages of the study of law by means of selected cases make its universal adoption a mere question of time.

The only serious objections made to the case method are that it takes too much time to give a student the requisite knowledge of the subject in this way and that the system loses sight of the difference between the preparation of the student and the lifelong training of the lawyer. Many collections of cases seem open to these objections, for they are so bulky that it is impossible to cover a particular subject with them in the time ordinarily allotted to it in the class. In this way the student discusses only a part of a subject. His knowledge is thorough as far as it goes, but it is incomplete and fragmentary. The knowledge of the subject as a whole is deliberately sacrificed to training in a part of the subject.

It would seem axiomatic that the size of the casebook should correspond in general to the amount of time at the disposal of instructor and student. As the time element is, in most cases, a nonexpansive quantity, it necessarily follows that, if only a half to two-thirds of the cases in the present collections can be discussed in class, the present casebooks are a third to a half too long. From a purely practical and economic standpoint it is a mistake to ask students to pay for 1,200 pages when they can only use 600, and it must be remembered that in many schools, and with many students in all schools, the matter of the cost of casebooks is important. Therefore, for purely practical reasons, it is believed that there is a demand for casebooks physically adapted and intended for use as a whole in the class-room.

But aside from this, as has been said, the existing plan sacrifices knowledge to training. It is not denied that training is important, nor that for a law student, considering the small amount of actual knowledge the school can hope to give him in comparison with the vast and daily growing body of the law, it is more important than mere knowledge. It is, however, confidently asserted that knowledge is, after all, not unimportant, and that, in the inevitable compromise between training and knowledge, the present casebooks not only devote too little attention relatively to the inculcation of knowledge, but that they sacrifice unnecessarily knowledge to training. It is believed that a greater effort should be made to cover the general principles of a given subject in the time allotted, even at the expense of a considerable sacrifice of detail. But in this proposed readjustment of the means to the end, the fundamental fact cannot be overlooked that law is a developing science and that its present can only be understood through the medium of its past. It is recognized as imperative that a sufficient number of cases be given under each topic

treated to afford a basis for comparison and discrimination; to show the development of the law of the particular topic under discussion; and to afford the mental training for which the case system necessarily stands. To take a familiar illustration: If it is proposed to include in a casebook on Criminal Law one case on abortion, one on libel, two on perjury, one on larceny from an office, and if in order to do this it is necessary to limit the number of cases on specific intent to such a degree as to leave too few on this topic to develop it fully and to furnish the student with training, then the subjects of abortion, libel, perjury, and larceny from an office should be wholly omitted. The student must needs acquire an adequate knowledge of these subjects, but the training already had in the underlying principles of criminal law will render the acquisition of this knowledge comparatively easy. The exercise of a wise discretion would treat fundamentals thoroughly: principle should not yield to detail.

Impressed by the excellence of the case system as a means of legal education, but convinced that no satisfactory adjustment of the conflict between training and knowledge under existing time restrictions has yet been found, the General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the class-room, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest.

The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject.

It is equally obvious that some subjects are treated at too great length, and that a less important subject demands briefer treatment. A small book for a small subject.

In this way it will be alike possible for teacher and class to complete each book instead of skimming it or neglecting whole sections; and more subjects may be elected by the student if presented in shorter form based upon the relative importance of the subject and the time allotted to its mastery.

Training and knowledge go hand in hand, and Training and Knowledge are the keynotes of the series.

If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief.

For the basis of calculation the hour has been taken as the unit. The General Editor's personal experience, supplemented by the experience of others in the class-room, leads to the belief that approximately a book of 400 pages may be covered by the average student in half a year of two hours a week; that a book of 600 pages may be discussed in class in three hours for half a year; that a book of 800 pages may be completed by the student in two hours a week throughout the year; and a class may reasonably hope to master a volume of 1,000 pages in a year of three hours a week. The general rule will be subject to some modifications in connection with particular topics on due consideration of their relative importance and difficulty, and the time ordinarily allotted to them in the law school curriculum.

The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.
Agency.
Bills and Notes.
Carriers.
Contracts.
Corporations.
Constitutional Law.
Criminal Law.
Criminal Procedure.
Common-Law Pleading.
Conflict of Laws.
Code Pleading.
Damages.
Domestic Relations.
Equity.
Equity Pleading.
Evidence.
Insurance.
International Law.
Jurisprudence.
Mortgages.
Partnership.
Personal Property, including the Law of Bailment.
Real Property. { 1st Year. / 2d " / 3d "
Public Corporations.
Quasi Contracts.
Sales.
Suretyship.
Torts.
Trusts.
Wills and Administration.

International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical,

and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

As an introduction to the series a book of Selections on General Jurisprudence of about 500 pages is deemed essential to completeness.

The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the class-room and the needs of the students will furnish a sound basis of selection.

While a further list is contemplated of usual but relatively less important subjects as tested by the requirements for admission to the bar, no announcement of them is made at present.

The following gentlemen of standing and repute in the profession are at present actively engaged in the preparation of the various casebooks on the indicated subjects:

George W. Kirchwey, Dean of the Columbia University, School of Law. *Subject, Real Property.*

Nathan Abbott, Professor of Law, Columbia University. (Formerly Dean of the Stanford University Law School.) *Subject, Personal Property.*

Frank Irvine, Dean of the Cornell University School of Law. *Subject, Evidence.*

Harry S. Richards, Dean of the University of Wisconsin School of Law. *Subject, Corporations.*

James Parker Hall, Dean of the University of Chicago School of Law. *Subject, Constitutional Law.*

William R. Vance, Dean of the George Washington University Law School. *Subject, Insurance.*

Charles M. Hepburn, Professor of Law, University of Indiana. *Subject, Torts.*

William E. Mikell, Professor of Law, University of Pennsylvania. *Subjects, Criminal Law and Criminal Procedure.*

George P. Costigan, Jr., Professor of Law, Northwestern University Law School. *Subject, Wills and Administration.*

Floyd R. Mechem, Professor of Law, Chicago University. *Subject, Damages.* (Co-author with Barry Gilbert.)

Barry Gilbert, Professor of Law, University of Illinois. *Subject, Damages.* (Co-author with Floyd R. Mechem.)

Thaddeus D. Kenneson, Professor of Law, University of New York. *Subject, Trusts.*

Charles Thaddeus Terry, Professor of Law, Columbia University. *Subject, Contracts.*

Albert M. Kales, Professor of Law, Northwestern University. *Subject, Persons.*

Edwin C. Goddard, Professor of Law, University of Michigan. *Subject, Agency.*

Howard L. Smith, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Wm. Underhill Moore.)

Wm. Underhill Moore, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Howard L. Smith.)

Edward S. Thurston, Professor of Law, George Washington University. *Subject, Quasi Contracts.*

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Clarke B. Whittier, Professor of Law, University of Chicago. *Subject, Pleading.*

Eugene A. Gilmore, Professor of Law, University of Wisconsin. *Subject, Partnership.*

Ernst Freund, Professor of Law, University of Chicago. *Subject, Administrative Law.*

Frederick Green, Professor of Law, University of Illinois. *Subject, Carriers.*

Ernest G. Lorenzen, Professor of Law, George Washington University. *Subject, Conflict of Laws.*

Frederic C. Woodward, Dean of the Stanford University Law School. *Subject, Sales.*

James Brown Scott, Professor of Law, George Washington University; formerly Professor of Law, Columbia University, New York City. *Subjects, International Law; General Jurisprudence; Equity.*

JAMES BROWN SCOTT,
General Editor.

WASHINGTON, D. C., October, 1912.

Following are the books of the Series now published, or in press:

Administrative Law
Bills and Notes
Carriers
Conflict of Laws
Corporations
Criminal Law
Criminal Procedure
Damages
Partnership
Persons
Pleading
Suretyship
Trusts
Wills and Administration

AUTHOR'S PREFATORY NOTE

THIS collection of cases on marriage and divorce is intended to supplement Kales' Cases on Persons. The writer has attempted to follow, in general, the method of treatment used by Mr. Kales. In so far as space has permitted, conflicting views have been developed and typical statutes set out. In addition, reference has been made to collections of statutes, and to articles suggesting the need of statutory reform. No attempt has been made to make the notes exhaustive, but frequent reference has been made to notes, articles, and texts where further cases may be found.

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COLLEGE OF LAW, UNIVERSITY OF ILLINOIS,
September, 1912.

TABLE OF CONTENTS

PART IV

MARRIAGE AND DIVORCE

CHAPTER I

MARRIAGE

Section		Page
1.	The Promise to Marry and Breach Thereof	1
	I. Historical	1
	II. Form and Proof of Promise	5
	III. Circumstances Vitiating Consent or Excusing Performance	16
	IV. Subject Notes	28
	(A) Whether the Action for Breach of Promise Survives	28
	(B) Damages in Suits for Breach of Promise	29
	(C) When the Right to Sue Accrues; Statute of Limitation	30
2.	Marriage as a Contract or Relation	31
	I. Nature of Marriage	31
	II. Formality	32
	(A) At Common Law and under Statute	32
	III. Annulment and Avoidance of Marriage	48
	(A) Grounds for Annulment Based on Lack of Capacity	48
	(a) Nonage	48
	(b) Insanity	54
	(c) Physical Disability	58
	(d) Relationship	58
	(e) Prior Subsisting Marriage	63
	(B) Grounds for Annulment Based on Lack of a Real Consent	72
	(a) Fraud	72
	(b) Duress or Mistake	88
	(c) Subject Notes	90
	(1) Power of a Court of Equity to Annul in Absence of Statute	90
	(2) Marriage in Jest	90
	(3) Annulment of Marriage after Death of One Party	90
	A Proposed Uniform Marriage Law	91

CHAPTER II

DIVORCE AND SEPARATION

1.	Divorce or Judicial Separation	95
	I. Jurisdiction	95
	II. Grounds for Granting Divorce	108
	(A) Adultery	109
	(B) Cruelty	116
	(C) Desertion	125
	(D) Imprisonment	138
	(E) Subject Note on Miscellaneous Grounds for Divorce	141

Section Page

III. Special Defenses 142
(A) Collusion 142
(B) Connivance 145
(C) Condonation 148
(D) Recrimination 153
IV. General Defenses 158
V. Alimony 159
(A) Permanent 159
(B) Temporary 164
(C) Alimony Unconnected with Divorce 166
VI. Effect of Divorce 167
2. Legislative Divorce 169
3. Separation Agreements 169

TABLE OF CASES

[CASES CITED IN FOOTNOTES ARE INDICATED BY ITALICS. WHERE SMALL CAPITALS ARE USED, THE CASE IS REFERRED TO IN THE TEXT]

	Page
Abbott v. Abbott	153
Adams v. Storey	168
Adger v. Ackerman	66
Albee v. Albee	134
ALEXANDRE v. ALEXANDRE	149
Allen v. Baker	29
Allen's Appeal	78
Andrews v. Andrews	108
Apgar v. Apgar	153
Aspinwall v. Aspinwall	173
Atherton v. Atherton	108
Aughtie v. Aughtie	62
Avakian v. Avakian	89
B. v. B.	58
BAILEY v. BAILEY	123
Bailey v. Bailey	147, 156
Bailey v. State	37
BAKER v. BAKER	80
Baker v. Baker	81
Baker v. Cartwright	26
Barber v. People	56
Barclay v. Commonwealth	90
Barker v. Barker	158
Barker v. Valentine	67
Barnes v. Barnes	143
Bashaw v. State	47
Bast v. Bast	154
Baylis v. Baylis	110
Beachy v. Brown	27
Bechtel v. Barton	66
Beggs v. State	48
Bennett v. Beam	29, 30
Beverlin v. Beverlin	44
BLACKBURN v. MANN	10
Blackburn v. Mann	12, 31
Blake v. Blake	158
Blandy v. Blandy	136, 137
Blattmacher v. Saal	18
Bochs v. Hanger	78
Bowers v. Bowers	59
Boylan v. Deinzer	62
Bramwell v. Bramwell	151
BREADALBANE CASE	65
BRICK v. GANNAR	10
Brick v. Gannar	12
BROADSTREET v. BROADSTREET	115, 136
Broadstreet v. Broadstreet	116
Brown v. Brown	120, 153, 163
Brown v. Odill	23, 30, 31
Broyhill v. Norton	24
Buerfening v. Buerfening	155
Burk v. Burk	138
Burke v. Shaver	24, 30
BURTIS v. BURTIS	38
Burtis v. Burtis	96
Burtis v. Burtis	90
Burtis v. Thompson	30
Cahn v. Cahn	58
Cammerer v. Muller	17
CAMPBELL v. CAMPBELL	65
Caris v. Caris	81
CARRIS v. CARRIS	82
Carter v. Rinker	17, 20
Cartwright v. McGown	39, 66, 67
Chamberlain v. Chamberlain	63
Chamberlain v. Williamson	28
Chapline v. Stone	56
Chapman v. Parsons	166
Chellis v. Chapman	30
Cheney v. Arnold	37
Chesley v. Chesley	30
Churchward v. Churchward	143
Clapp v. Clapp	153
Clark v. Barney	72
Clark v. Clark	153, 158
Colbath v. Rollins	62
Collins v. Bishop	43
Collins v. Collins	169
COLLINS v. VOORHEES	66
Commonwealth v. Munson	47
Commonwealth v. Richards	172
Commonwealth v. Stevens	67
Commonwealth v. Stump	37
Cooper v. Crane	90
Coover v. Davenport	17
Capsey v. Copsey	153
Cowles v. Cowles	123
Craig v. Craig	122
Crane v. Crane	81
CREHORE v. CREHORE	80, 83
Crehore v. Crehore	82
Crewe v. Crewe	145
Crounse v. Crounse	134
Cumming v. Cumming	158
Curlett v. Curlett	131
Cushman v. Cushman	155

Page

D'Aguilar v. D'Aguilar....150, 152
D'Aguilar v. D'Aguilar..... 152
Dalrymple v. Dalrymple..... 41
Dalrymple v. Dalrymple..... 36
Danforth v. Danforth..... 137
Daniel v. Bowles..... 21
Daniel v. Bowles.....15, 17
Darling v. Dent..... 72
Davenport v. Davenport..... 131
Davis v. Pryor.....17, 22
Decker v. Decker..... 155
Deisler v. Deisler..... 156
De Laubenque v. De Laubenque.. 134
Delpit v. Young..... 78
Dennis v. Dennis.....141, 147
Derby v. Phelps..... 10
Derby v. Phelps..... 11
De Thoren v. Attorney General 70
Di Lorenzo v. Di Lorenzo..... 83
Ditson v. Ditson..... 99
Ditson v. Ditson..... 31
Douglass v. Douglass..... 134
Duberstein v. Duberstein.....125, 154
Ducasse's Heirs v. Ducasse..... 56
Dumaresly v. Fishly..... 32
Duncan v. Duncan..... 39
Durham v. Durham.....57, 74
Durham v. Durham..... 56

Eaton v. Eaton..... 69
Ecker v. Ecker..... 159
Edmonds v. Hughes..... 29
Eldred v. Eldred..... 43
Eliot v. Eliot.....51, 53
Elzas v. Elzas.....134, 161
Ennis v. Ennis..... 120
Evans v. Evans..... 122
Eve v. Rogers..... 19

Fairchild v. Fairchild..... 83
Fisher v. Bernard..... 51
Fisher v. Fisher.....137, 158
Fishli v. Fishli..... 126
Flanagan v. Flanagan..... 67
Foote v. Nickerson..... 171
Ford v. Stier..... 88
Foss v. Foss.....80, 83
Foss v. Foss..... 82
Foster v. Means..... 56
Franke v. Franke.....78, 82, 110
Franklin v. Franklin..... 134
Frazer v. Boss..... 29
Freeborn v. Freeborn..... 120
Fritz v. Fritz..... 125
Fritz v. Fritz..... 134
Frost v. Knight..... 30

G. v. G...... 154
Geiger v. Ryan..... 72
Ginger v. Ginger..... 158
Goodall v. Thurman..... 24
Gould v. Gould..... 58

Page

Gower v. Gower..... 147
Grand Lodge v. Smith..... 90
Graves v. Graves..... 138
Greene v. Greene..... 165
Griffeth v. Griffeth..... 141
Griffiths v. Griffiths..... 143
Gring v. Lerch..... 29
Gross v. Gross..... 56
Groth v. Groth..... 165
Grover v. Zook..... 29
Grubb v. Sull..... 28
Gulick v. Gulick..... 23

H. v. B...... 58
Haddock v. Haddock..... 108
Hagert v. Hagert..... 165
Hall v. Wright..... 9
Hall v. Wright..... 28
Hamaker v. Hamaker..... 55
Hamilton v. Lomax..... 51
Handy v. Handy..... 140
Handy v. Handy..... 141
Hanks v. Naglee..... 23
Hardy v. State..... 51
Harris v. Harris..... 143
Harris v. Hicks..... 62
Harrison v. Cage.....7, 11
Harrison v. Cage..... 1
Harrison v. Harrison..... 81
Harrison v. State..... 62
Harrison v. Swift..... 29
Harteau v. Harteau..... 106
Haviland v. Halstead..... 22
Hayden v. Vreeland..... 28
Hayes v. Rollins..... 62
Hebblethwaite v. Hepworth..... 36
Heermance v. James..... 126
Heidrick v. Heidrick..... 147
Hickey v. Campion..... 15
Hill v. Good..... 62
Hill v. Hill..... 176
Hilton v. Roylance.....36, 37, 72
Hitchins v. Hitchins..... 158
Hochster v. De la Tour..... 30
Hoffman v. Hoffman..... 82
Holcroft v. Dickenson..... 1
Holloway v. Griffith..... 30
Holloway v. Holloway..... 139
Holmes v. Holmes..... 39
Holt v. Clarencieux..... 6
Holt v. Ward..... 51
Homan v. Earle..... 15
Hooe v. Hooe..... 152
Hotchkins v. Hodge..... 24
Hudson v. Hudson..... 131
Hulett v. Carey..... 39
Hunter v. Hatfield.....29, 30
Hunter v. Hunter..... 143
Hutton v. Mansell.....14, 15
Hutton v. Mansell.....1, 15
Hyde v. Hyde..... 72

Imboden's Estate, In re..... 72

	Page
Ingle v. Ingle	90
Jacoby v. Stark	30
James v. James	132
Jenkins v. Jenkins	158
Johansen v. Modahl	30
Johnson v. Levy	29
Johnson's Heirs v. Raphael	47
Jones v. Jones	158, 169
Jones' Estate, In re	169
Judy v. Sterrett	16, 24
Kantzler v. Grant	29
Kaufman v. Fye	30
Kelley v. Kelley	161
Kelley v. Riley	17, 29, 30
Kelly v. Renfro	30
KENNEDY v. KENNEDY	137
Kennedy v. Kennedy	138
Kent v. McCann	167
Kirkpatrick v. Kirkpatrick	136, 137
Klutts v. Klutts	139
Koch v. Koch	131
KOONCE v. WALLACE	50
Koonce v. Wallace	51
Kretz v. Kretz	116
Kurtz v. Frank	24, 30
Laing v. Laing	134
Land v. Land	69
Lattimore v. Simmons	29
Le Barron v. Le Barron	161
Le Mesurier v. Le Mesurier	108
Leonard v. Leonard	138
Levy v. Levy	109
Lewis v. Lewis	56
Lewis v. Tapman	5
Liese v. Meyer	30
Lindsay v. Lindsay	152
Lister v. Lister	131
Livingston v. Livingston	163
LONDONDERRY v. CHESTER	55
Lorimer v. Lorimer	36
Loux v. Loux	138
LOVEDEN v. LOVEDEN	114
Lovering v. Lovering	147
Lyndon v. Lyndon	81, 90
Lyon v. Lyon	79
McClurg v. Terry	90
McEwen v. McEwen	116
McGowan v. McGowan	138
McIlvain v. Scheibley	63
McKenna v. McKenna	36
McLaughlin's Estate, In re	47
Magrath v. Magrath	134
Maher's Estate, In re	43
Malone v. Malone	154
Manning v. Spurck	69
Marsh v. Whittington	90
Martin v. Martin	62, 139
Massey v. Massey	120
Matchin v. Matchin	112
Matchin v. Matchin	114
Mathewson v. Mathewson	116
May v. May	147
MAYNARD v. HILL	8
Maynard v. Hill	32, 169
Medlock v. Merritt	90
Meister v. Moore	37
Milford v. Worcester	47
Millard v. Millard	147
MILLWARD v. LITTLEWOOD	19, 21
Millward v. Littlewood	17
Mims v. Mims	116
Mohler v. Shank	141
Moller v. Moller	158
Moorehouse v. Moorehouse	152, 153
Morrill v. Palmer	19
MORRISON v. MORRISON	147
Morrison v. Morrison	147
Mosher v. Mosher	124
Mosher v. Mosher	153
Moss v. Archer	72
Moss v. Moss	72
Moss v. Moss	88
Mussing v. Mussing	161
NICHOLS v. NICHOLS	137
Nichols v. Nichols	114, 136
NICHOLS v. WEAVER	10
Nichols v. Weaver	12
Noice v. Brown	22
Norman v. Norman	47
Noyes v. Noyes	145
Offield v. Davis	47
Oliver v. Oliver	141
Paddock v. Robinson	21
Paris v. Strong	12
Park v. Barron	55
People v. Schoonmaker	53
People v. Slack	53
Perkins v. Hersey	30
PHILPOTT v. WALLET	7, 11
Pidge v. Pidge	129
Pike v. Pike	72
Pochlmann v. Kertz	29
Pollock v. Sullivan	19
Port v. Port	36, 37, 39
PORTSMOUTH v. PORTSMOUTH	55, 75
Potter v. Potter	158
Powell v. Moeller	24
Prendergast v. Prendergast	110
Price v. Price	56
Pyott v. Pyott	56
Quincy v. Quincy	151
Randall v. Kreiger	31
Rawson v. Rawson	90
REGINA v. MILLIS	42, 44, 75
Regina v. Millis	39, 90
REYNOLDS v. REYNOLDS	58, 80
Reynolds v. Reynolds	81
Rigsby v. Rigsby	131

	Page
Ring v. Ring	125
Ritter v. Ritter	81
Robertson v. Cole	81
Robbins v. Robbins	152
Robbins v. Robbins	158
Robinson v. Redd's Adm'r	47
Robinson v. Robinson	120
Robinson v. Ruprecht	66, 67
Rogers v. Rogers	152
Rumping v. Rumping	99
Russell v. Russell	122
Ryder v. Ryder	81
Salchert v. Reinig	16
Sampson v. Sampson	161
Sanders v. Coleman	29
Sarfaty v. Sarfaty	134
Savage v. Savage	163
Saxon v. Wood	24
Schroter v. Schroter	58
Schuchart v. Schuchart	69
Scott v. Sebright	88, 90
SCOTT V. SHUFELDT	83, 87
Scott v. Schufeldt	82
Seilheimer v. Seilheimer	82
Senge v. Senge	43
Severns v. Severns	123
Shackleford v. Hamilton	29
Shackleton v. Shackleton	148
SHAFHER V. STATE	50
Short v. Stone	30
Shuler v. Millsaps	29
Sickert v. Sickert	131
Sims v. Sims	56
Sinclair v. Sinclair	81
SISEMORE V. SISEMORE	126
Sissung v. Sissung	81
Smith v. Compton	29
Smith v. North Memphis Sav. Bank	47
Smith v. Sherman	29
Smith v. Smith	81, 90
Somers v. Somers	165
Sorenson v. Sorenson	43
SOUTHWICK V. SOUTHWICK	123, 127, 128
Sparks v. Sparks	171
Spiers v. Hunt	25, 26
Sprague v. Craig	30
Stapleberg v. Stapleberg	63
State v. Cone	51
STATE V. DUKET	140
State v. Duket	141
State v. Lowell	53
State v. Thompson	43
States v. States	81
Stebbins v. Palmer	28
Stewart v. Lee	29
STEWART V. STEWART	137
Stewart v. Stewart	112
Stiehr v. Stiehr	158
Stier v. Stier	88
Stiles v. Stiles	155
Stokes v. Anderson	143
Storms v. Storms	156
Storrs v. Storrs	136
Storrs v. Storrs	136
Svenson v. Svenson	81
Synge v. Synge	128
Tait v. Tait	82
Teter v. Teter	37
Thompson v. Thompson	142
Tobin v. Shaw	29
Todd v. Todd	144
Todd v. Todd	90
Torlotting v. Torlotting	147
Totten v. Totten	153
Trammell v. Vaughan	29
True v. Ranney	54
TURNER V. MEYERS	55, 74
Turner v. Meyers	56
Turner v. Turner	72
ULLMAN V. MEYER	10
Ullman v. Meyer	12
Vanderpool v. Richardson	29
Van Houton v. Morse	27, 28
Van Voorhis v. Van Voorhis	158
Vercade v. Vercade	125
Viertel v. Viertel	147
Vondal v. Vondal	81
Vroom v. Marsh	166
W. v. W.	122
Wade v. Kalbfleisch	29
Wahle v. Wahle	158
Walker v. Walker	156
Wallace v. Wallace	82
Walls v. State	51, 53
Ward v. Dulaney	56
Warn v. Warn	147
Watson v. Watson	128
Waymire v. Spencer	90
Way v. Way	95
Wells' Estate, In re	67
Westerfield v. Westerfield	164
Wightman v. Coates	12
WILD V. HARRIS	19, 21
Wild v. Harris	16
Williams v. Williams	128
Willits v. Willits	51
Wilson v. Carnley	24
Wilson v. Carnley	25, 26
WILSON V. WILSON	146
Wilson v. Wilson	161
Wood v. Baker	51
Woodward v. Woodward	147
Wray v. Wray	115
Yale v. Curtiss	16
YOUNG V. YOUNG	140
Zatlin v. Davenport	30

CASES ON MARRIAGE AND DIVORCE

(Part IV of Kales' Cases on Persons and Domestic Relations)

CHAPTER I

MARRIAGE

SECTION 1.—THE PROMISE TO MARRY AND BREACH THEREOF

I. Historical [1]

26 GEO. II, c. 33, § 13: "XIII. And it is hereby further enacted, That in no case whatsoever, shall any suit or proceeding be had in any ecclesiastical court, in order to compel a celebration of any marriage in facie ecclesiæ, by reason of any contract of matrimony whatsoever, whether per verba de præsenti, or per verba de futuro, which shall be entered into after the twenty-fifth day of March in the year one thousand seven hundred and fifty-four; any law or usage to the contrary notwithstanding."

HOLCROFT v. DICKENSON.

(Court of Common Pleas, 25 Car. II, 1672. Carter, 233.)

An Action on the Case upon a Promise: The Plaintiff declares, that the 10th of November, 21 Car. II, in consideration she did assume and promise to marry the Defendant within a Fortnight, the

[1] For additional historical matter the student is referred to Swinburne on Spousals (see especially at pages 231, 232, for a description of ecclesiastical and secular remedies previous to St. 26 Geo. II, c. 33, § 13); 6 Bac. Abr. 460–462 (Bouvier's Ed.); Howard, A History of Matrimonial Institutions, vol. II, pp. 200–203 (for breach of promise suits in the American colonies); 10 Law Quar. Rev. 135, article by J. Dundas White on "Breach of Promise of Marriage," tracing the origin of this action in England and Scotland and commenting on the important cases of Holcroft v. Dickenson, supra; Harrison v. Cage et ux., Carthew, 467 (1697), Hutton v. Mansell, 6 Mod. 172 (1703), etc.

Defendant did assume and promise within a fortnight to marry her; and says, That this hindered her preferment to her damage of 100 Pounds: Verdict for the Plaintiff. Arrest of Judgment.

Argued by the Court seriatim.

Ellis, Justice. It hath been moved in Arrest of Judgment, that the Action lies not.

1. Here is no consideration, except Spiritual matter, and such whereof our Law can take no notice; there is not Quid pro quo.

2. It is such a Consideration which is not possible in the power of the Defendant to perform: For in this case, without another Act to be done (that is to say) by the Priest, there can be no Marriage at all. Several Cases Have been put, Coke 4. fo. 29. Buntings Case, the Conusance of the right of Marriage doth belong to the Ecclesiastical Court. 7 H. VI. fo. 1. One bargained that another should have his Daughter; there was not Quid pro quo, 45 Ed. III. 24. If a man Covenant by Deed to marry such an one, it is good; if without Deed, it is of Ecclesiastical Conusance. 14 Ed. IV. 6. If a man promise £20. in marriage with his Daughter, it is of Ecclesiastical Conusance. If a man promise a certain sum of Money to another to marry his Daughter, no Action lies at Common Law: it is a cause of Matrimony, by Choke and Littleton, agreeing with the Master of the Rolls, 19 Ed. IV. 10. 20 Ed. IV. 3.

Notwithstanding the opinion of all these Books, I conceive the Action is well brought, and that Judgment ought to be given for the Plaintiff.

My Reason is, Here is a mutual Contract betwixt the parties about a lawful thing, and I hold it is not merely a Spiritual act. True, Ecclesiastical Courts have Conusance of it. If one pleads, Nient accouple en loyal Matrimony, they shall judge and bind us; but if he plead Nient sa feme, it shall be tried by Common Law. Anciently Marriage did not belong to the Ecclesiastical Court; not till the time of Pope Alexander the Third.

Selden will tell you what the rights of Marriage were originally, it was not a thing of Ecclesiastical Jurisdiction. If a Suit were in this Court concerning a Marriage to be executed in specie, we have nothing to do in it; when there is actus contra actum, Action will lye at Common Law. We bring not the Action to meddle with the Marriage, but for the Damages, that he hath not taken her according to his Promise. Fitzherbert N. B. 44. a. 120. K. Brook pl. 108. Action on the Case. Marriage is a consideration the Common Law takes notice of. If I covenant in consideration of Marriage, that I will stand seised, Ac. this will raise a good use, Plowd. 305. Fitzh. N. B. fo. 120. if one promise £20. to another to marry his Daughter, an action of Debt lies, Broke Debt. 107. Doctor & Stud fo. 104.

Later Authorities are full. Dyer 272. pl. 32. an action on the Case upon a promise of £20. made to the Plaintiff by the Defendant, in

consideration the Plaintiff had taken to wife the Cozen of the Defendant, was good, with a special request laid.

I will give as much as I give with other my daughters; an Action on the Case lies against Executors, Crok Jac. Sanders and Esterby, Strecher and Parkers Case. after these times precedents are innumerable.

Therefore I hold Judgment pro Querente.

Atkins, Justice. I am for Judgment for the Plaintiff.

It hath been strongly objected, that here is nothing in the Case, but that is of meer Ecclesiastical Conusance. In the ancient Year-Books the matter is much disputed, yet the Year-Books are with some distinction, 45 Ed. 3. 24. If the Promise to marry be by Deed, then its triable at Common Law, otherwise not if without Deed. Fitzh. N. B. 120. 17 Ed. IV. 45. b. 9 Ed. IV. 10. 22 Ass. pl. 70. By which you may see the Ancient Books are not agreeable in this point, 14 Ed. IV. 6. there the distinction is more nice. If the Defendant promise £20. to marry his Daughter, it is determinable at Common Law; but if the Defendant promise £20. with his Daughter, this ought to be sued in the Spiritual Court, 20 Ed. IV. fo. 3. Nele was there of a different opinion, and gave the Case of Tithes.

Later Authorities are full.

Object. This entitling the Common Law Courts to Promises of Marriage was in troublesome times.

Resp. Stretcher and Parkers Case was before the troublesome times, 14 Car. I. 1 Rolls Abr. 22. Hill. 14 Jac. 1 Rolls Abr. fo. 14. pl. 3, 4. Sanders and Esterby. Trin. 10 Car. Chapmans Case. Pasch. 5 Car. Nortons Case. It is not for us to go contrariant to these Judgments; that which toucheth Matrimony, whether lawful or not lawful, ought to be tried in the Spiritual Court; but in our case the Spiritual Court cannot give remedy for damages.

Object. Its not a temporal Damage.

Resp. It is: Marriage to a woman especially, is an advancement or preferment, 4 Rep. Ann Davies Case. Loss of Matrimony is a temporal loss, Trin. 22 Jac. B. R. 1 Rolls Abr. 35. Tonsons Case, and innumerable Cases more. I hold Judgment ought to be for the Plaintiff.

Windham, Justice, pro Querente.

An Action upon the Case upon a Promise for a Portion, this is not our Case properly; and the Cases cited are put where Marriage was consummated. In our Case there is no Marriage, no way whereby the ecclesiastical Court can be entitled to it. The Books speak much of the consideration of the Act being grounded upon Ecclesiastical matter, that therefore it ought to be questioned there; yet the Books all agree, that if there be a temporal matter doth interpose whereupon the Action is grounded, remedy may be had at the Common Law; a man may sue for one thing in the Ecclesiastical Court, and at Common Law; too. One sues for a pension properly

in the Spiritual Court; yet if it be upon a Grant by the Parson and Patron, he may sue for it at the Common Law; that Case 45 Ed. III. 24. which puts the distinction of a Deed and no Deed, I cannot understand the difference. For one is as much a temporal act as the other is; the Cases are infinite, You will not find a Case as ours is, where the Marriage is not consummated. As our Case is, I think the Action will lye: here is a mutual Promise. Mutual Promises are good Considerations to support Actions upon the Case; in our Case there is mutual Promise, and a Promise of Marriage too, than which is no greater Consideration.

Object. Here is an act to be done by another, and perhaps the party may be within Age.

Resp. Within Age shall not be presumed. If I undertake to do an act, whereto a third person must concur, I must procure him to do it. And there may be a very great temporal loss: Ann Davies Case; the ground of the Action there was for losing her preferment, Hobart p. 10. Griesly and Lowther. Rolls 1 Abridg. fo. 19. Hutton p. 17. 1 Rolls Abr. fo. 22. Stretch and Parker. This is clear Authority, and the Reason is clear, and grounded upon a future Promise. I hold Judgment ought to be given for the Plaintiff.

Chief Justice VAUGHAN, pro Defendente.

Actions upon the Case have increased much since the Queen's time. Late Authorities in the troublesom times are of no moment. The Case of Stretch and Parker in Car 1. is but a single Judgment. No question there are many Ecclesiastical matters upon which may be temporal Contracts. Now I shall come to shew how this matter doth differ from the other Cases. I shall first look over the Record.

1. I except to the Declaration: She saith, In consideration she had promised to take him to Husband, within two weeks space he promised to Marry her: But when she comes to alledge the matter in fact, that she was parata & abtulit se &c but saith not infra duas septimanas, as the Promise is.

2. Except. When one is to do an act, and a third person is requisite to that act, if one would intitle himself to an Action, he ought expressly to shew the act was so offered to be done as it ought to be done, as with a Priest and other circumstances in our Case. It is not said, she tendered at the Church, nor when any Minister was by.

Now to the Point.

A Promise to take one to Husband absolutely, notwithstanding any impediment; this is not a good Promise, and the impediments of Marriage are to be judged in the Spiritual Court; and this Reason differs this Case from the rest. If a man call another Heretick, an Action lies not here, because if the Defendant justifie, this Court cannot judge of it: And so is our Case, if she promised to marry him absolutely, and an action brought against her here she cannot alledge an Impediment, as she might do in the Ecclesiastical Court, and Promise in Question must be necessarily intended, if there were

no impediment; the Book of 14 Ed. IV. 6. this is expressly by way of contract and not as a Marriage portion. The Judgment was final, and they all said it was of Ecclesiastical Conusance, 45 Ed. III. fo. 24. Covenant to marry by Deed is good, without Deed its of Ecclesiastical Conusance, 22 Ass. pl. 7. Det. Br. 134. is a sudden opinion, Fitzherberts Opinion hath led many into a mistake, 44 Letter E. its founded upon this very Book of 22 Assise, he not taking notice of the difference of Deed, and Without Deed.

Now I shall put this as a single Case.

The promise made by Mary was expressly to take him to Husband before such a time; its nudum pactum, and no Consideration. I shall agree according to the common Case. If A. is bound to enfeoffe B. by such a day, and B. refuseth, and the bond is sued, its a good plea to say he was ready and offered, and he refused: If Mary had entered into Bond to marry him by such a day, and he had sued it, it had been a good plea in this case for her to say, She offered and he refused. In our Case it is otherwise: this case is void for want of recompence, for the performance of a thing promised; this hath nothing in it but a bare Pactum.

The next thing to difference it from other Cases is this: She shall never have an Action unless she make it good on her part, and she can never make it good on her part as this Promise is; if she demand the recompence she doth perform her part; its necessary he perform his part, and then they are Man and Wife. No such act reciprocal is a good consideration in this case. One of full age marries one under age, she may dissent. In consideration you will promise to lye with me in the same Bed, I promise to lye in the same Bed with you. This is a parallel Promise, the performance of one part doth perform the other. In consideration you will hold my hand with yours, I will hold yours with mine. That which is supposed to be a Consideration, is a direct consequence; If you read a Deed in my hearing, I promise to hear it.

So for default in Pleading and other Reasons, I hold Judgment ought to be given for the Defendant.

II. Form and Proof of Promise

LEWIS v. TAPMAN.

(Court of Appeals of Maryland, 1900. 90 Md. 294, 45 Atl. 159, 47 L. R. A. 385.)

McSherry, C. J.[2] This is a suit to recover damages for a breach of promise to marry. That there was an agreement, of some sort, between the plaintiff and defendant to marry, is certain, but whether

[2] Part of the opinion is omitted.

that agreement was absolute or conditional is one of the grounds of contention. It is insisted by the plaintiff that the defendant agreed to marry her within three years from a designated date; while, upon the other hand, it is alleged by the defendant that his promise was conditional, and that in no event was the promise set up by the plaintiff to be fulfilled until the expiration of three years from the time it was made. We need not, though it would be quite entertaining if we did, refer to the evidence bearing on these controverted issues of fact, and we need not refer to it, because the legal questions involved can be disposed of without quoting from the testimony. There is an inquiry suggested at the very threshold, and arising for the first time in Maryland, that may as well be considered and settled at once. Upon the assumption that the contract to marry was in fact made with a stipulation that it was not to be solemnized until after the expiration of three years, does it fall within that clause of the fourth section of the statute of frauds, which prohibits any action from being brought upon an agreement not to be performed within a year, unless the agreement be reduced to writing and be signed by the party to be charged therewith? This is the question which the rejected prayer interposed by the defendant, at the close of the case made by the plaintiff, and set forth in the ninth bill of exceptions, presents.

A contract to marry was treated at common law, so Blackstone states (Book 1, p. 433), "in no other light than as a civil contract"; but it is in reality something more. Questions relating to marriage were, from a very remote period, cognizable only in the ecclesiastical courts, which had no authority to award damages, but imposed censures, as was supposed, for the welfare of the soul. It is curious and interesting to trace the conflicts between these courts and the common-law courts, and, in a measure, the court of chancery, in the efforts of the last-named tribunals to expand their jurisdiction, and correspondingly to restrict that of the former, over these contracts. This expansion gradually grew until the last remnant of the ecclesiastical court's jurisdiction was swept away by 20 & 21 Vict. c. 85, except as to the granting of licenses. As the ecclesiastical courts formerly possessed sole authority in questions relating to marriage (this was conceded by Lord Chief Justice Vaughan, 1 Cart. 233), but as they had no power in cases of a breach of promise other than to decree a performance of the marriage (4 Bac. Abr. tit. "Marriage and Divorce," 530), which jurisdiction was taken away by 26 Geo. 2, c. 33, the common-law courts, after the adoption of the statute of frauds, in 1676, began to entertain civil actions for a breach of a contract per verba de futuro, and that jurisdiction, Lord Chief Justice Raymond observed in 1733, "was a point not to be disputed." Holt v. Clarencieux, 2 Strange, 937. After considerable discussion, it was finally adjudged that the two courts could not act concurrently, but that, if an appeal were had to the ecclesiastical court to

compel a performance, the common-law courts could not hear a suit for damages, and so e converso. The suit at common law was at first greatly opposed, because the party had his remedy in the spiritual court. But, notwithstanding this, it was resolved the party had his election of either remedy, and that by bringing an action at common law the remedy in the spiritual court was waived and released; "for now," as remarked by Lord Chief Justice Holt, "in lieu of performance of the contract he shall recover damages." Collins v. Jessot, Holt, 458. In another particular there was with respect to such contracts flat contradiction in the early cases. Philpott v. Wallet, 3 Lev. 65, decided in the thirty-fourth year of the reign of Charles the Second, and five years after the statute of frauds had been adopted, was the first case which held that a promise to marry was within the other clause of the fourth section relating to contracts made in consideration of marriage. But this construction was departed from and overruled 11 years later, in Harrison v. Cage, 1 Ld. Raym. 386, and is no longer the law, either in England or in Maryland. Cork v. Baker, 1 Strange, 34; Ogden v. Ogden, 1 Bland. 284. In the reign of Charles the First, the court of chancery evinced a disposition to assume jurisdiction to enforce the specific performance of the contract to marry (Toth. 124, as cited in 2 Camp. Lives Ld. Ch. p. 138), but it does not appear that the power was ever exercised.

These conflicts of jurisdiction, these variant decisions, serve to emphasize, what is otherwise perfectly apparent, that there has always been about the marriage contract that which renders it different from any other contract known to the law. A recent writer thus describes that difference: "It has been frequently said in the courts of this country that marriage is nothing more than a civil contract. That it is a contract is doubtless true, to a certain extent, since the law always presumes two parties of competent understanding, who enter into a mutual agreement, which becomes executed, as it were, by the act of marriage. But this agreement differs essentially from all others. This contract of the parties is simply to enter into a certain status or relation. The rights and obligations of that status are fixed by society in accordance with principles of natural law, and are beyond and above the parties themselves. They may make settlements and regulate the property rights of each other; but they cannot modify the terms upon which they are to live together, nor superadd to the relation a single condition. Being once bound, they are bound forever. Mutual consent, as in all contracts, brings them together, but mutual consent cannot part them. Death alone dissolves the tie, unless the legislature, in the exercise of a rightful authority, interposes, by general or special ordinance, to pronounce a solemn divorce." Schouler, Dom. Rel. § 13. And Mr. Justice Story, in his Conflict of Laws (section 108), though treating marriage as in its origin a contract of natural law, proceeds in note 3 to re-

mark: "But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties; and in this view it has some peculiarities, in its nature, character, operation, and extent of obligation different from what belong to ordinary contracts."

So Fraser, while defining marriage as a contract, adds: "Unlike other contracts, it is one instituted by God himself, and has its foundation in the law of nature. It is the parent, not the child, of civil society." 1 Fras. Dom. Rel. 87. A learned American writer (Bish. Mar. & Div. [6th Ed.] § 18) not only pronounces for this doctrine, but ascribes the chief embarrassment of American tribunals, in questions arising under the conflict of marriage and divorce laws, to the custom of applying the rules of ordinary contracts to the marriage relation. But this is not all. Prior to the adoption of our constitutional provision prohibiting the legislature from passing special laws granting divorces, it had been the custom of the general assembly to divorce, by statute, from the bonds of marriage, and this court held that such legislation could "be viewed in no other light than as regular exertions of legislative power." Crane v. Meginnis, 1 Gill & J. 474. What other contract can the legislature annul? Even the inhibition in the federal constitution, which denies to a state the power to pass any law impairing the obligation of a contract, does not prevent the dissolution of the marriage contract by an act of assembly. "It never has been understood," said Chief Justice Marshall in the Dartmouth College Case, 4 Wheat. 519, 4 L. Ed. 629, "to restrict the general right of the legislature to legislate on the subject of divorce." Marriage, holds the supreme court in a much later case, is not a contract, within the meaning of the prohibition in the federal constitution against the impairment of contracts by state legislation. Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654.

It is true that many of the observations just quoted from the text writers refer to the marriage relation or status, and it is also true that there is a distinction between the contract of marriage and a contract to marry. But the terms, "contract of marriage" and "contract to marry," are used to express the same idea, though, perhaps, it may not be strictly accurate to so use them. There is no reason for distinguishing "the contract of marriage," if by that term is meant the marriage relation, from all other contracts, that does not equally apply to the contract to marry, which precedes and is a foundation of the consummated agreement. As the contract of marriage or the contract to marry, treating them as identical, is so essentially different from every other contract known to the law, it cannot be assumed that parliament, by the use of the words "any agreement," intended to include the contract to marry within the prohibition contained in the clause of the fourth section of the statute of frauds,

which requires an agreement that is not to be performed within a year to be reduced to writing As we have seen, no action was maintainable in the common-law courts on an agreement to marry when the statute was passed. Such an agreement was obviously not one of the contracts then contemplated by the lawmakers as being within the statute. The objects of a contract to marry are totally unlike the purposes to be accomplished by any other contract. The relation it has in view is wholly distinct from the relation which any other contract could contemplate. The capacity of the parties to it to enter into it is far less restricted as to age than in any other agreement. It can only be made between a man and a woman. It has its origin in the natural law, and is the foundation of society. All these considerations indicate that the statute was not designed to embrace it.

Why should a contract of this nature be placed in the same category with one for the sale of goods or the performance of labor, and be made subject to the provisions of an enactment obviously intended to regulate suits on undertakings relating to the ordinary business and dealings in trade and commerce? Sir Frederick Pollock observed in Hall v. Wright, El. Bl. & El. 793: "I think that a view of the law which puts a contract of marriage on the same footing as a bargain for a horse or a bale of hay is not in accordance with the general feeling of mankind, and is supported by no authority."

The fact that parties to a breach of promise suit could not testify until 32 & 33 Vict. c. 68, gave them the right to do so, in England, made it exceedingly improbable that a specific contract to marry at a time more than a year from the date of entering into the agreement could be proved at all, except in rare instances, particularly as the method of proving a contract to marry differs very materially from the mode of proving any other contract. The parliament knowing, as it must be presumed that it did know, that it had not been definitely settled, when the statute of frauds was passed, that a suit at common law could be brought for a breach of promise to marry, it is scarcely legitimate to infer that a contract to marry, the precise terms of which were rarely, if ever capable of exact proof, was designed to be included within the provision of the statute. Looking, then, to the nature of the contract to marry, to its origin, its antiquity, and its objects, and having regard to the early method of enforcing it in the spiritual courts, and considering how distinct it is, in all the particulars we have indicated, from every other kind of contract which can be entered into, and bearing in mind that it is, as Lord Robertson, a distinguished Scottish judge, declared, "the very basis of the whole fabric of civilized society," we are unwilling to say that it falls, or was intended to fall, within the term "any agreement," as that term is used in the statute of frauds.

There were three American cases cited by the appellant's counsel in support of the contention that a contract to marry, if not to be performed within a year, is unenforceable under the statute. These were Derby v. Phelps, 2 N. H. 515; Nichols v. Weaver, 7 Kan. 373; Ullman v. Meyer (C. C.) 10 Fed. 241. On the other hand, we were referred by the appellee's counsel to Brick v. Gannar, 36 Hun, 52, and we have found Blackburn v. Mann, 85 Ill. 222, which sustain the opposite view. But no English case was called to our attention, and, after a diligent search, we have discovered none on either side of the question. In Blackburn v. Mann, supra, the court say: "Contracts of marriage, although defined as civil contracts, are peculiar, and it is, perhaps, not entirely accurate to say they are subject to the same strict construction as civil contracts in relation to property. Contracts of marriage, until a breach is shown that terminates them, may be regarded as continuing contracts by consent of the parties, and hence are, in no just sense, within the statute of frauds."

The cases relied on by the appellant turned upon the construction of the state statutes involved, which are not identical in phraseology with the statute of 29 Car. II. It is stated in 3 Pars. Cont. p. 3, that, although provisions substantially similar have been made by the statutes of this country, in no one state is the English statute exactly copied. But in Maryland the statute of 29 Car. II. is in force, not because there is any enactment transcribing it, but because of the provisions of article 5 of the declaration of rights, which declares that the inhabitants of Maryland are entitled to the benefit of such of the English statutes in force in the state on the 4th day of July, 1776, as have been found applicable to their local and other circumstances. In Ullman v. Meyer, supra, it was conceded by District Judge Wallace that, "as an original proposition, it might be debated whether the statute of frauds was ever intended to apply to agreements to marry. They are," he went on to say, "agreements of a private and confidential nature, which, in countries where the common law prevails, are usually proved by circumstantial evidence, and at the time the English statute was passed were not actionable at law, but were the subjects of proceedings in the ecclesiastical courts to compel performance of them."

But, after all, "a contract not to be performed within a year, and specifically so agreed, is the only one within this clause." Dennison, C. J., in Fenton v. Emblers, 3 Burrows, 1278. There was evidence in the cause that the contract to marry was to be performed within three years, and there was no evidence of a specific agreement that it should not be performed within a year. According to all the cases, if there was a possibility of its being performed within a year, and there was no stipulation that it should not be, then the contract would not be within the statute, even though it had relation to a

subject-matter to which the statute was applicable. Cole v. Singerly, 60 Md. 348; Ellicott v. Peterson's Ex'rs, 4 Md. 476. * * *

For the reasons we have given, the judgment, which was for the plaintiff, will be affirmed. Judgment affirmed, with costs above and below.[3]

DERBY v. PHELPS.

(Supreme Court of New Hampshire, 1822. 2 N. H. 515.)

This was an action of assumpsit on a promise of marriage. At the trial here, under the general issue, and a plea of the statute of limitations, the plaintiff proposed to prove, that in A. D. 1811, the defendant, being about to commence the study of his profession, desired the plaintiff to receive his addresses as a suitor, and at the end of about five years, when he expected to be settled in business, to marry him; and that, in pursuance of this offer, his addresses were received, and continued till the defendant's marriage with another lady, in A. D. 1820.

This evidence was objected to, as within the statute of frauds; but having been admitted, a verdict was found for the plaintiff, subject to future consideration on the validity of the above objection.

WOODBURY, J.[4] Our statute "to prevent frauds and perjuries" provides, among other things, "that no action shall be brought whereby to charge any person upon an agreement made upon consideration of marriage, or upon any agreement, that is not to be performed within the space of one year from the time of making it, unless such promise or agreement" "be in writing." 1 N. H. Laws 178.

The defendant cannot avail himself of the first clause above cited; because, though once decided in Philpott vs. Wallet, 3 Lev. 65, that a contract to marry must in all cases be in writing; yet, that decision has since been overruled in Cork vs. Baker, 1 Stra. 34, and in Harrison vs. Cage and wife. 1 Ld. Ray. 386. Salk. 24. 5 Mod. 411. Bull N. P. 280. 2 Equ. Ca. Ab. 248. Skin. 196.

This clause of the statute is now held to reach not mutual promises to marry,[5] but only promises for other things made in consideration of marriage. Bac. Ab. "Agreement," C. 3.

But under the other clause of the statute, we apprehend the objection to the evidence must be adjudged fatal. This was an agreement, which by the terms of it was not to be performed till the expiration of about five years; and hence comes within the very teeth of the statute. Had the tenor of the agreement been, that the con-

[3] For adverse comment on this case, see note in 14 Harv. Law Rev. 63.

[4] Part of the opinion is omitted.

[5] To same effect, see Browne, Stat. of Frauds (5th Ed.) § 215a; Reed on Statute of Frauds, § 186, and cases cited.

tract should be fulfilled on a certain event, which might or might not have happened within a year, but which in fact did not happen till after a year, the agreement would not have been within the statute. 1 Salk. 280. Skin. 326. Stra. 34. Burr. 1278. 1 Bl. Rep. 353. 1 Ld. Ray. 317. Com. Rep. 49. Holt, 326. 3 Salk. 9. Moore v. Fox, 10 Johns. (N. Y.) 244, 6 Am. Dec. 338.

But such was not the tenor of it. Nor can this description of contracts be taken out of the statute by the circumstances, that when the original statute of frauds passed under Charles the II., these contracts were not sued at law, but were merely the subject of proceedings to compel a performance of them in the ecclesiastical courts. For numerous kinds of contracts, not then in use and not then prosecuted in the common law courts, have since had birth under the new exigencies and improvements of society, and are all brought to the test of the general provisions of the statute.

In respect to a part performance of this contract, which doubtless, if proved, might cure the absence of any writing, Bac. Ab. "Agreement," C., and Auths. there cited, the case as saved presents no question of this kind, and, according to our recollection, none such was raised at the trial.

Should this be relied on hereafter as an answer to the statute, it will then be early enough to decide what ought to be considered a part performance of a contract, on whose rites and ceremonies, and their respective importance in perfecting a marriage, so much diversity of opinion exists. * * *

New trial.[6]

WIGHTMAN v. COATES.

(Supreme Judicial Court of Massachusetts, 1818. 15 Mass. 1, 8 Am. Dec. 77.)

Assumpsit on a promise to marry the plaintiff, and a breach thereof by refusal, and having married another woman.

At the trial on the general issue, at the last November term before Parker, C. J., the evidence of a promise resulted from sundry letters

[6] In the following cases, also, promises not to be performed within a year were held to be within the statute: Nichols v. Weaver, 7 Kan. 373 (1871); Paris v. Strong, 51 Ind. 339 (1875), semble; Ullman v. Meyer (C. C.) 10 Fed. 241 (1882).

In Brick v. Gannar, 36 Hun, 52 (1885), the court, construing the New York act in the light of its title, "Of fraudulent conveyances and contracts relative to goods, chattels and choses in action," held a similar promise not to be within the statute. In speaking of Ullman v. Meyer, supra (which also arose under the New York statute), the court says: "The learned judge in that case overlooked the title of the statute." The court also comments on Derby v. Phelps and Nichols v. Weaver, supra, in which there were no words of limitation in the title of the statutes involved.

In Blackburn v. Mann, 85 Ill. 222 (1877), it was also held that a similar promise was not within the statute, on the theory that the contract was a continuing one.

written to the plaintiff by the defendant, and from his attentions to her for a considerable length of time.

It was objected by the defendant, that there being no direct evidence of an express promise, the action could not be maintained.

This objection was overruled by the judge; and the jury were instructed that if, from the letters of the defendant read in evidence, and the course of his conduct towards the plaintiff, they were satisfied that there was a mutual understanding and engagement between the parties to marry each other, they might find for the plaintiff, which they did.

If the said direction was right, judgment was to be rendered on the verdict; otherwise a new trial was to be granted.

PARKER, C. J., delivered the opinion of the Court. Respectable counsel having expressed doubts upon the point reserved in this case, and having also suggested an opinion that the action was of a nature to be discountenanced rather than favored,[7] we have given more consideration to the case, than our impression of the merits of the objections would have required.

We can conceive of no more suitable ground of application to the tribunals of justice for compensation, than that of a violated promise to enter into a contract, on the faithful performance of which the interest of all civilized countries so essentially depends. When two parties, of suitable age to contract, agree to pledge their faith to each other, and thus withdraw themselves from that intercourse with society which might probably lead to a similar connexion with another—the affections being so far interested as to render a subsequent engagement not probable or desirable—and one of the parties wantonly and capriciously refuses to execute the contract, which is thus commenced; the injury may be serious, and circumstances may often justify a claim of pecuniary indemnification.

When the female is the injured party, there is generally more reason for a resort to the laws, than when the man is the sufferer. Both have a right of action, but the jury will discriminate and apportion the damages according to the injury sustained. A deserted female, whose prospects in life may be materially affected by the treachery of the man, to whom she has plighted her vows, will always receive from a jury the attention which her situation requires;

[7] In a note in 7 Harv. Law Rev. 372, may be found a more recent expression of a similar opinion. It is there suggested that the action for breach of promise of marriage is anomalous and seems peculiar to the common law. That it is really a suit in tort with heavy punitive damages, sometimes used as a method of blackmail, forces a commercial view of a matter not properly regarded as a matter of trade, and brings into undue publicity feelings not properly the subject of judicial investigation. "If it is not to be abolished, at least the proof of the promise should be regulated. There is a serious lack of consistency in requiring written proof of a contract of sale of goods worth $50 or so, and allowing a woman to recover $10,000 or more on her own parol testimony strenuously denied by the man."

and it is not disreputable for one, who may have to mourn for years over lost prospects and broken vows, to seek such compensation as the laws can give her. It is also for the public interest, that conduct tending to consign a virtuous woman to celibacy, should meet with that punishment, which may prevent it from becoming common. That delicacy of the sex, which happily in this country gives the man so much advantage over the woman, in the intercourse which leads to matrimonial engagements, requires for its protection and continuance the aid of the laws. When it shall be abused by the injustice of those who would take advantage of it, moral justice as well as public policy dictate the propriety of a legal indemnity.

This is not a new doctrine. As early as the time of Lord Holt, it was enforced, as the common law, by that wise and learned judge and his brethren, that a breach of promise of marriage was a meritorious cause of action. 3 Salk. 16, Hutton v. Mansell. 2 Comyns on Contracts, 408. And although the value of a marriage in money might have had some influence in that decision, there is no doubt that the loss sustained in other respects,—the wounded spirit, the unmerited disgrace, and the probable solitude, which would be the consequences of desertion after a long courtship,—were considered to be as legitimate claims for pecuniary compensation, as the loss of reputation by slander, or the wounded pride in slight assaults and batteries.

Nor is this English law become obsolete. It is the common law of our country, always recognized when occasions have offered; and the occasions have not been unfrequent since the adoption of our constitution. 3 Mass. 189, 3 Am. Dec. 122, Boynton v. Kellogg. In the case of Paul v. Frazier, 3 Mass. 71, 3 Am. Dec. 95, Chief Justice Parsons says: "As the law now stands, damages are recoverable for a breach of promise of marriage."

Several actions of this nature have been before this court, since I have been upon the bench, and I remember several when I was in practice at the bar, in which I was counsel. Indeed there is no country, in which the relative situation of the sexes, and their joint influence on society, would render such a principle of jurisprudence more useful or necessary.

As to the technical ground, upon which the objection to the verdict now rests, we entertain no doubts. The exception taken is, that there was no direct evidence of an express promise of marriage made by the defendant. The objection implies that there was indirect evidence, from which such a promise may have been inferred; and the jury were instructed that if, from the letters written by the defendant as well as his conduct, they believed that a mutual engagement subsisted between the parties, they ought to find for the plaintiff. They made the inference, and without doubt it was justly drawn.

Is it then necessary, that an express promise in direct terms should be proved? A necessity for this would imply a state of public man-

ners by no means desirable. That young persons of different sexes, instead of having their mutual engagements inferred from a course of devoted attention, and apparently exclusive attachment, which is now the common evidence, should be obliged, before they considered themselves bound, to call witnesses, or execute instruments under hand and seal, would be destructive of that chaste and modest intercourse, which is the pride of our country; and a boldness of manners would probably succeed, by no means friendly to the character of the sex, or the interests of society.

A mutual engagement must be proved, to support this action: but it may be proved by those circumstances, which usually accompany such a connexion. No case has been cited, in support of the defendant's objection. On the contrary, it is very clear from all the English cases, that a promise may be inferred, and that direct proof is not necessary. In the case before referred to of Hutton v. Mansell, Lord Holt says expressly, that where one has promised, and the behavior of the other is such as to countenance the belief that an engagement has taken place, this is evidence enough of a promise on the part of the person so conducting; and the same principle will apply to both the parties.

In the present case, however, the evidence on which the jury relied, was of a decisive nature; for the letters of the defendant, which were submitted to them, were couched in terms which admit only of the alternative, that he was bound in honor and conscience to marry the plaintiff, or that he was prosecuting a deeply laid scheme of fraud and deception, with a view to seduction. The jury believed the former, and in so doing, have vindicated his character from the greater stain; and he ought to be content with the damages, which they thought it reasonable to assess for the lighter injury.

Judgment on the verdict.[s]

[s] In Daniel v. Bowles, 2 C. & P. 553 (1826), defendant declared his love for plaintiff in the presence of plaintiff's mother, obtained the mother's consent, and made some arrangements for the marriage. Plaintiff said nothing, but continued to receive defendant's visits in the capacity of a suitor. Best, C. J., said: "I think that her being present, and not making any objection, coupled with what happened afterwards, shews that she consented, and would be sufficient to enable the defendant to maintain an action against her. It would be indelicate to expect that she should consent in words. No doubt the Jury must be satisfied that there were mutual promises; but I think there is evidence from which they may be inferred." Plaintiff received a verdict for £1,500.

In Homan v. Earle, 53 N. Y. 267 (1873), Church, C. J., said: "Contracts of marriage are unlike all others. They concern the highest interests of human life, and enlist the tenderest sympathies of the human heart, and the acts and declarations done and employed by parties in negotiating them are often correspondingly delicate and emotional. As matter of law the learned judge was clearly right in holding that no formal language is necessary to constitute the contract of marriage. If the conduct and declarations of the parties clearly indicate that they regard themselves as engaged, it is not material by what means they have arrived at that state. The authorities both in this country and England establish this doctrine. Hutton v. Mansell, 6 Mod. 172; Hickey v. Campion, 20 Weekly R. 752; [Southard v. Rex-

III. Circumstances Vitiating Consent or Excusing Performance

WILD v. HARRIS.

(Court of Common Pleas, 1849. 7 C. B. 999.)

Assumpsit for a breach of promise of marriage. * * * At the trial, before Maule, J., at the sittings in Middlesex, after the last Hilary term, a verdict was found for the plaintiff, damages £10.[9]

Wilde, C. J. This was a motion in arrest of judgment. The action was for a breach of promise of marriage; and the declaration stated, that, in consideration that the plaintiff, being sole and unmarried, at the request of the defendant, promised to marry him within a reasonable time, the defendant promised the plaintiff to marry her within a reasonable time; it then went on to aver, that the plaintiff remained sole and unmarried, and had always been ready and willing to marry the defendant, but that the defendant disregarded his promise, and at the time of making his promise, and from thenceforward, was and continued married, and that the plaintiff was ignorant of the defendant's marriage at the time of the making of his promise. On behalf of the defendant, it has been contended, that, inasmuch as the declaration discloses that the defendant was a married man at the time of the making of the alleged promise,—so that the plaintiff was not bound by her promise to marry the defendant,—there was a total absence of consideration.

But the declaration alleges a promise by the plaintiff to marry the defendant within a reasonable time,—which involves within it a promise to remain single for a reasonable time; and this the plaintiff avers that she did do: and that is consideration enough. And the defendant's promise to marry the plaintiff within a reasonable time, was not absolutely impossible of performance; for, his wife might have died within a reasonable time, and so he would have been in a condition to perform his promise to the plaintiff. The authority referred to by my Brother Cresswell in the course of the argu-

ford] 6 Cow. 254; [Wells v. Padgett] 8 Barb. 323; [Hotchkins v. Hodge] 38 Barb. 117; [Hoitt v. Moulton] 21 N. H. 586; [Kniffen v. McConnell] 30 N. Y. 285; 5 Wils. & Shaw, 144; 2 Dow. & Clark, 282."

In Salchert v. Reinig, 135 Wis. 194, 115 N. W. 132 (1908), it was held that testimony of the woman that there was a promise of marriage was sufficient, even though uncorroborated, and though denied by the man. For other cases on the weight and sufficiency of the evidence necessary to prove the promise, see the following: Clark v. Pendleton, 20 Conn. 495 (1850); Judy v. Sterrett, 52 Ill. App. 265 (1893); Green v. Spencer, 3 Mo. 318, 26 Am. Dec. 672 (1834); Yale v. Curtiss, 151 N. Y. 598, 45 N. E. 1125 (1897); Walker v. Johnson, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100 (1893); Edge v. Griffin (Tex. Civ. App.) 63 S. W. 148 (1901); McKee v. Monser, 131 Iowa, 203, 108 N. W. 228 (1906).

[9] Part of the statement of the case is omitted, as it appears sufficiently in the opinion.

ment,—from Brooke's Abridgment,[10]—seems to recognise the principle which must govern this case. There, a woman infeoffed a man, upon condition that he (being then a married man) should marry her within a reasonable time. The feoffee infeoffed another person, and he another, and so on. The man died, being still married; whereupon the original feoffor entered as for condition broken; and it was held that it was a lawful condition; for, that the feoffee's wife might have died within a reasonable time. It would be strange indeed, to allow the defendant to rely upon his own wrong,—to set up his fraudulent concealment of his marriage,—in order to discharge himself from his promise; the plaintiff having performed her part of the consideration, by remaining unmarried, and ready to marry the defendant, until she discovered that he was already a married man. We therefore think there is no ground for the application.

Rule refused.[11]

[10] The reference referred to is Brooke's Abr. title "Conditions," p. 119. This professes to be an abridgement of the case in 40 Ass. 13.

[11] Pollock, C. B., in Millward v. Littlewood, 5 Exch. 775 (1850), in referring to the principal case, said: "Therefore, as there is the judgment of a court of co-ordinate jurisdiction upon the express point, I feel myself bound by it, and must leave the parties to question that decision in a Court of Error. I own, however, that I am disposed to differ from the authorities which have been referred to. I think it is inconsistent with that affection, which ought to subsist between married persons, that a man should, while his wife is alive, promise to marry another woman after his wife's death. Nothing but the judgment of the highest tribunal will compel me to think that, by the law of the land, such a promise is good."

The following cases, in which plaintiff was ignorant of defendant's marriage, are in accord with the principal case: Millward v. Littlewood, 5 Exch. 775 (1850); Daniel v. Bowles, 2 C. & P. 553 (1826); Davis v. Pryor, 3 Ind. T. 396, 58 S. W. 660 (1900); Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336 (1871); Stevenson v. Pettis, 12 Phila. (Pa.) 468 (1877); Coover v. Davenport, 1 Heisk. (Tenn.) 368, 2 Am. Rep. 706 (1870); Cammerer v. Muller, 60 Hun. 578, 14 N. Y. Supp. 511 (1891), affirmed in 133 N. Y. 623, 30 N. E. 1147 (1893); Carter v. Rinker (C. C.) 174 Fed. 882 (1909).

In Coover v. Davenport, supra, it was held error for the trial court to charge the jury that plaintiff would forfeit all right to recover if, after learning of defendant's existing marriage, she did not repudiate the contract, but was still willing to carry it out in a reasonable time. Nicholson, C. J., said: "To hold that she lost her right to full damages by delaying to sue under such circumstances would be to hold that defendant could avail himself of his fraud in procuring her to delay, in order to relieve himself of his liability for damages for the original fraud in procuring from her a promise of marriage. So far from being relieved from the liability growing out of his original fraud, by exerting his power over her to induce her not to repudiate the contract on her part, he estopped himself from relying on such a defense, if she delayed at his urgent request, or if she did so in consequence of his false and fraudulent representations."

BLATTMACHER v. SAAL.

(Supreme Court of New York, 1858. 29 Barb. 22.)

Appeal by the defendant, from a judgment of the city court of Brooklyn. The complaint alleged that on or about the 1st day of May, 1857, the plaintiff, being then sole and unmarried, and competent to contract to marry, and the defendant representing himself to be sole and unmarried, and competent to contract to marry, and also representing his name to be John Sauer, did, in consideration of the promise of the plaintiff to marry said defendant, then faithfully promise to marry the plaintiff; and that the plaintiff, confiding in said representations and promise, hath from that time to this remained, and still is, sole and unmarried. That the plaintiff had no knowledge, or information sufficient to form a belief, that any of said representations of the defendant were false, or that said promise of the defendant to marry the plaintiff was fraudulent, at the time of the making of said mutual promise to marry. The plaintiff further alleged that the said representations of the defendant were false, and made with the intention to deceive and injure the plaintiff; the real name of said defendant being John A. Saal, and that he then was, for many years had been, and still is, a married man; and that the promise by said defendant to marry the plaintiff was fraudulent, and to the injury and damage of the plaintiff to the amount of ten thousand dollars, for which sum the plaintiff demanded judgment against the defendant, together with the costs of the action.

To this complaint the defendant demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled by the city court, on argument; and no answer having been put in, judgment was ordered for the plaintiff, and her damages were assessed by a sheriff's jury as $5,000.

By the Court, Emott, J. This complaint states sufficiently the promise to marry by the defendant, and his representation that he was unmarried, and competent to marry the plaintiff. It was obviously unnecessary to allege that he knew this representation to be untrue, when he is alleged to have been in fact married. It then avers that the plaintiff, confiding in this representation and promise, continued, and still is, unmarried, and that she had no knowledge or information to lead her to believe that the promise and representation of the defendant were false or fraudulent, and it avers a breach of the defendant's representation and promise, and damages.

This is a good cause of action, and if the plaintiff cannot recover for the deceit and damage—a question on which it is not necessary to express an opinion at present—she certainly may upon the contract and promise to marry, which implied and involved a promise and agreement, that the defendant was competent legally to marry. It is said that the performance of the agreement was impossible and

and represented that he was single.
Held for Plaintiff.

illegal. But this was unknown to the plaintiff, and her agreement was not illegal. It was to marry the defendant, if he was, and believing him to be, unmarried. It cannot be possible that she may not recover the damages which she has sustained in consequence of having innocently made this engagement, and remained unmarried to perform it. The parties are not in pari delicto, and the defendant must restore the plaintiff to what she has lost by his deceit, and his promise to do what he could not legally perform.

What he agreed to do was not an act illegal in itself. If it had been, no action could have been maintained upon the promise. But he promised to do an act which it was unlawful for him to consummate with the plaintiff, only because he was legally disqualified from doing it and this was unknown to the plaintiff.

There are two cases in the English courts directly in point, Wild v. Harris, 7 C. B. 999, and Millward v. Littlewood, 1 Eng. L. & E. 408. The reasoning of the Barons of the Exchequer in the latter case, particularly the opinion of Baron Parke, is entirely satisfactory to us.

The judgment of the city court must be affirmed; but the defendant may withdraw his demurrer, and put in an answer within ten days after notice of the filing of the remittitur, on payment of all the costs since the demurrer. The judgment may stand as security.[12]

EVE v. ROGERS.

(Appellate Court of Indiana, 1895. 12 Ind. App. 623, 40 N. E. 25.)

Ross, C. J. This was an action brought by the appellee, in the Floyd Circuit Court, against the appellant, to recover damages for the breach of a marriage contract. The venue of the cause was changed to the Clark Circuit Court, where, upon a trial by jury, a verdict was returned in favor of appellee.

The specifications of error assigned in this court are as follows:

"First. The court erred in overruling the demurrer to the substituted and amended complaint.

"Second. The court erred in overruling the appellant's motion for a new trial."

The first specification has not been argued, and for that reason is considered waived.

Under the second specification, which calls in review the ruling of the court in overruling appellant's motion for a new trial, several

[12] In Pollock v. Sullivan, 53 Vt. 507, 38 Am. Rep. 702 (1881), also, it was held that tort for deceit was a proper action.

See, also, Morrill v. Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411 (1895), where defendant, who was already married, married plaintiff, who was ignorant of the existing marriage; the court holding that tort for deceit would lie, as a logical result of Pollock v. Sullivan, supra.

questions are presented, namely: Whether or not the evidence is sufficient to sustain the verdict; whether or not the court erred in admitting in evidence a certified copy of a decree of the Floyd Circuit Court, and whether or not the damages assessed are excessive.

Counsel, while admitting that the appellee testified that the appellant promised to marry her, insist that her testimony, as shown by the record, fails to prove a contract.

In this position we think counsel are in error. True the evidence is uncertain as to the time when the contract was entered into, and time, in this case, is a very material question, for if the contract was entered into prior to June 1, 1890, and at a time when appellee was a married woman, it was void for want of mutuality. The contract must be binding upon both parties, or it can not bind one. Hence it follows that a contract to marry, entered into between a man and a woman, one of whom is qualified to make such a contract and the other is not, is void, and can not be enforced. Neither can damages be recovered for a breach thereof, for the reason that the contract, not being binding as to the one, is not binding as to the other.[13]

The evidence, as it comes to us, is in narrative form, and although, as heretofore stated, is not clear as to when the promise was made, is sufficient on that question to sustain the verdict.

The court did not err in admitting in evidence the certified copy of the decree of the Floyd Circuit Court, granting appellee a divorce from her husband, Charles P. Rogers. By this we do not mean to be understood as holding that the mere introduction of the copy of the decree, without the other proceedings of the court or the pleadings in the cause, was all that was necessary, but what we do hold is that the certified copy of the decree was competent evidence, and proper to be given to the jury. Anderson v. Ackerman, 88 Ind. 481.

This brings us to a consideration of the remaining question, namely: Are the damages excessive?

We recognize and appreciate the force of the rule so well settled, viz. that this court will not reverse a judgment on account of the amount of damages assessed in an action of this character, unless the amount assessed clearly appears to have been the result of prejudice, partiality, or corruption; yet, when upon an examination of the evidence, it appears to the mind of the court that the damages assessed are so excessive and unjust that the jury, in assessing them, must have been influenced by passion, prejudice or partiality, or have proceeded upon a wrong principle, a new trial will be ordered.

The damages assessed in this case, in view of the evidence, are excessive, and a new trial should be granted.

Judgment reversed, with instructions to the court below to sustain appellant's motion for a new trial.

GAVIN, J., dissents.

[13] See Carter v. Rinker (C. C.) 174 Fed. 882 (1909), for comment on the above language.

by each other - Held plaintiff could maintain an action for breach of contract to marry - Agreement is void

PADDOCK v. ROBINSON.

(Supreme Court of Illinois, 1872. 63 Ill. 99, 14 Am. Rep. 112.)

LAWRENCE, C. J. This was an action for a breach of promise of marriage. On the trial the court, against the objection of defendant, permitted the plaintiff to prove promises of marriage made at a time when both parties were married and known to be so by each other. We can not understand how an action can be maintained on such a promise. It can not be performed except upon the death or divorce of the husband of the one party, and the wife of the other: and to hold that it is valid because it may be performed in such a contingency, would be to introduce into social life a dangerous and immoral principle. Only in the most corrupt condition of society could such agreements be tolerated as lawful. They are, in themselves, a violation of marital duty, and the persons who make them are morally unfaithful to the marriage tie. A contract so deeply at war with the best interests of social life, and which can neither be proposed on the one side nor listened to on the other without a consciousness of moral wrong—a contract, too, incapable of performance except upon a contingency so remote as not to be expected, and which it is a sin to anticipate for such a purpose—such a contract should certainly not be recognized as valid in a court of justice.

We find no case in which this question has been expressly decided. Counsel for appellee cites Chitty on Contracts, 587, where it is said that the promise of a married man to marry within a reasonable time is not void, although he was married at the time of making such promise, because his wife might have died within such reasonable time. But on examining the authorities on which the text is based, and which are cited by the author, namely, Wild v. Harris, 7 C. B. 999, and Millward v. Littlewood, 5 Exch. 775, we find, in both cases, the plaintiff was not aware that the defendant had a wife living at the time of making the promise. The same was true in Daniel v. Bowles, 2 C. & P. 553.

We fully concur in these decisions. The plaintiff was an innocent party. She did not know she was listening to immoral professions or accepting a promise which the promisor had no right to make. In such cases, courts may well hold that the promisor can not avail himself of his fraudulent concealment of his marriage as a defense to an action upon the contract. In the case before us, neither party was innocent. Both knew their contract of marriage was essentially immoral.

For the error in permitting the plaintiff to prove the promises of marriage made while the plaintiff's husband and the defendant's wife

were living, and known to be so by both parties, the judgment must be reversed and the cause remanded.

Judgment reversed.[14]

NOICE v. BROWN.

(Supreme Court of New Jersey, 1875. 38 N. J. Law, 228, 20 Am. Rep. 388.)

On demurrer to the declaration.

Argued at November Term, 1875, before BEASLEY, Chief Justice, and Justices DEPUE and VAN SYCKEL. The opinion of the Court was delivered by

BEASLEY, Chief Justice. The declaration, to which a demurrer has been filed, complains in all its counts of a breach of a promise of marriage. The counts are special, and all contain the same facts. The case thus presented is, that the defendant, being a married man, and living apart from his wife, and in expectation of a divorce from her by force of a bill then pending, promised the plaintiff to marry her in a reasonable time after such divorce should have been obtained.

I can not see the faintest semblance of legality in the promise here laid. It is wholly fallacious to suppose that a contract is not illegitimate if the act agreed to be done would not be illegal at the time of its contemplated performance. Such is not the law. A contract is totally void, if, when it is made, it is opposed to morality or public policy. The institution of marriage is the first act of civilization, and the protection of the married state against all molestation or disturbance is a part of the policy of every people possessed of morals and laws. But this relationship, in order to execute the purpose for which it is established, requires the undivided devotion of each of the parties to it to the other, and the consequence is that it is invaded and impaired by anything which has a tendency to alienate such devotion. But this plaintiff claims the right to take to herself that affection of this husband, which, in legal theory at least, belongs to the wife; but such a transfer the law will not sanction. Such conduct is a gross violation of the rights of the wife. Nor, in a legal point of view, does it at all strengthen the argument to suggest that the defendant, at the time of making this promise, was living separated from his wife, and was looking forward to a divorce. While the marriage exists the duties inherent in such marriage likewise exist, and they cannot be thrown off at the will of either party. By voluntarily withdrawing from the society of his wife a man cannot free

[14] Accord: Davis v. Pryor, 112 Fed. 274, 50 C. C. A. 579 (1901).

In Haviland v. Halstead, 34 N. Y. 643 (1866), plaintiff knew when the promise was made that defendant had been divorced for adultery, and prohibited from marrying again, and that his former wife was still living; held that defendant's promise to marry was void by statute.

himself from his matrimonial obligations. Nor can he do so in the hope of a divorce. If a husband can bind himself to a future marriage conditioned on the getting of a divorce, so he can incur a similar obligation to be put in effect on the dissolution of his marriage by the death of his wife. Such contracts are highly impolitic and highly scandalous, and are, therefore, illegal.

The demurrer must be sustained.[15]

HANKS v. NAGLEE.

(Supreme Court of California, 1879. 54 Cal. 51, 35 Am. Rep. 67.)

Appeal from a judgment for the plaintiff, and from an order denying a new trial, in the Twentieth District Court, County of Santa Clara. Belden, J.

The facts are stated in the opinion.

BY THE COURT: This is an action for a breach of promise of marriage. The alleged promise is denied by the answer. The plaintiff was examined as a witness in her own behalf, and testified in substance that the agreement between the parties was, that the plaintiff should then presently surrender her person to the defendant, and that in consideration of such surrender the defendant would afterward marry her. "He promised me that if I should give up myself to him, that he should marry me."

"Q. What did you say to that?"

"A. At first I refused; at last I, of course, gave myself up to him."

First. Upon well settled principles the plaintiff should not have recovered upon a contract of this character. As being a contract for illicit cohabitation, it is tainted with immorality. Story on Cont. § 458; Steinfeld v. Levy, 16 Abb. Prac. N. S. (N. Y.) 26, and other authorities cited in appellant's brief.

Second. But this question was not made below, nor is the record here in such a condition as would, under the settled rules of practice, permit us to determine the case upon this point.

Third. But the Court below, in stating to the jury "the elements of injury which go to make up the sum total of damage" which the plaintiff might be considered to have sustained, instructed them as follows: "Next, if * * * the defendant, taking advantage of the promise under which she (the plaintiff) was acting, has had illicit

[15] In Gulick v. Gulick, 41 N. J. Law, 13 (1879), where a statute made absolutely void the marriage of a person incurably impotent, it was held that no action would lie for breach of promise of marriage made by such a person to one who knew of his condition.

In Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914 (1900), it was held that a promise to marry on the death of defendant's divorced wife was not condemned by public policy, there being no legal impediment in the way of an immediate marriage.

relations, and has seduced the plaintiff, that is another element proper for the jury to consider," etc. But the evidence which we have just detailed, coming as it did from the mouth of the plaintiff herself, shows that this case is not one of the character assumed by the Court as the basis for this instruction. It was confessedly not a case in which the defendant, taking advantage of the trust and confidence which may be fairly supposed to exist between parties who have in apparent good faith made mutual promises of marriage, has abused the confidence of a female, and induced her to yield him favors which she might have otherwise withheld. The agreement to yield her person to him was one appearing to have been deliberately made in advance, and when there had been no promise of marriage. It is clear, therefore, that the hypothesis upon which this instruction was based could not be assumed by the jury for the purpose of fixing the amount of damages the plaintiff was to recover.

Judgment and order denying a new trial reversed, and cause remanded for a new trial. Remittitur forthwith.[16]

WILSON v. CARNLEY.

(King's Bench Division, 1907. 23 Times Law Rep. 578.)

This was the argument of a point of law raised on the pleadings in an action for damages for alleged breach of promise of marriage. The statement of claim alleged that the defendant verbally promised on June 19, 1894, to marry the plaintiff upon the death of the defendant's wife, who was then living, and that the promise was verbally ratified and renewed by the defendant at Easter, 1897, and that in January, 1906, the defendant's wife died, but that the defendant refused to marry the plaintiff. The defendant denied the alleged promise and the alleged ratification or renewal. He further pleaded that the alleged promise and renewal and ratification were contrary to public policy and good manners, and were illegal and void, and

[16] Accord: Goodall v. Thurman, 1 Head (Tenn.) 209 (1858); Boigneres v. Boulon, 54 Cal. 146 (1880); Saxon v. Wood, 4 Ind. App. 242, 30 N. E. 797 (1892); Judy v. Sterrett, 153 Ill. 94, 38 N. E. 633 (1894); Burke v. Shaver, 92 Va. 345, 23 S. E. 749 (1895); Edmonds v. Hughes, 115 Ky. 561, 74 S. W. 283, 24 Ky. Law Rep. 2467 (1903).

In the preceding cases the promise to marry was given for a promise to engage in future illicit intercourse. Compare with the following cases in which promises to marry were exchanged, followed by illicit intercourse, which it was held did not vitiate the promise to marry: Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275 (1881); Powell v. Moeller, 107 Mo. 471, 18 S. W. 884 (1891); Judy v. Sterrett, 52 Ill. App. 265 (1893); Spellings v. Parks, 104 Tenn. 351, 58 S. W. 126 (1900); Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024 (1903).

Compare, also, Hotchkins v. Hodge, 38 Barb. (N. Y.) 117 (1862), in which the illicit intercourse came first, followed by a promise to marry, which was held valid.

in the alternative that the plaintiff had released and discharged him from the alleged promise, and that the plaintiff had conducted herself in a manner inconsistent with the maintenance of any engagement by publishing libels of the defendant.

Mr. Justice CHANNELL, in giving judgment, said that there was really no authority upon the point. The statement of Chief Baron Pollock was apparently not agreed to by Baron Parke, and was only a dictum, as it was not necessary for the decision of the case. As against that there was some ancient and not very intelligible authority, which Chief Baron Pollock seemed to have thought was against his view, and which Baron Parke certainly thought was against the view of the Chief Baron. He had no doubt that the reason why there was no authority was that in practice such a question never arose in the abstract form in which it was now before him, because when such promises were in fact made they were generally accompanied by immorality, and were not binding. He had to decide whether a promise by a married man to marry another woman on the death of his wife, the woman to whom he made the promise necessarily knowing that he was a married man was, as an abstract proposition, contrary to public policy.

Assuming that the ground of such promise being said to be contrary to public policy was that it was inconsistent with the affection which ought to exist between a husband and wife, he thought that was not necessarily so, as for example in the case of a man's wife being in a lunatic asylum or in a case where a man's wife asked him in the event of her death to marry a particular person. It is impossible to lay down the abstract proposition that such a promise as the one now in question was necessarily void as being contrary to public policy; and it was not desirable at the present day to introduce new grounds of illegality of that kind, for it had been frequently held that the doctrine of illegality on grounds of public policy should not be extended. On the whole he was not prepared to decide this point of law in favour of the defendant so as to stop the action, as it was impossible to say, as an abstract proposition, that the promise was invalid or illegal. The case must, therefore, go for trial.[17]

[17] See judgment of Lord Coleridge accord, in same case after trial, in Wilson v. Carnley, 23 L. T. R. (K. B. Div.) 757 (1907).

Compare Spiers v. Hunt, 24 L. T. R. (K. B. Div.) 183 (1907), contra. In this case Phillimore, J., said: "My Brother Channell, in Wilson v. Carnley, supra, thought that there might be cases in which there would be no mischievous tendency, or not so much mischief, and he instanced cases in which the other consort was an incurable lunatic, or the promise was made at the deathbed and upon the request of the dying consort, and therefore he declined to decide as a matter of law that such a promise could never be enforced. I have not to deal with such cases, and my decision does not necessarily cover them; it may be that the rule is general, but not universal. Where there is confirmed lunacy there may be no injury to the lunatic consort, but there remains the objection of probable sexual immorality. In the other case, if the consort be indeed on a deathbed, there is no palpable danger; but as Chief Justice Best said, when it was attempted for other

BAKER v. CARTWRIGHT.

(Court of Common Pleas, 1861. 10 C. B. [N. S.] 124.)

The declaration stated that the plaintiff and the defendant agreed to marry one another, and a reasonable time for such marriage had elapsed, and the plaintiff had always been ready and willing to marry the defendant; yet the defendant had neglected and refused to marry the plaintiff; and the plaintiff claimed £500.

The defendant pleaded—first, that he did not promise and agree as alleged; secondly, a denial of the breach of contract alleged; thirdly, that he entered into the said agreement in the declaration mentioned upon the faith and under the belief that the plaintiff had been and was of sound mind, and had never been afflicted with insanity, and had never been legally confined as a lunatic in a lunatic asylum, whereas the plaintiff, before the making of the said agreement, had been and was of unsound mind, and had been legally confined as a lunatic in a lunatic asylum, which the defendant first discovered after making the said alleged agreement and before the alleged breach thereof, wherefore the defendant then refused to marry the plaintiff, which was the alleged breach.

The plaintiff joined issue on the above pleas; and, for a second replication to the third plea, said that the unsoundness of mind therein mentioned existed only for a short time, to wit, four months, and that after she had been confined in the lunatic asylum as in that plea mentioned, and before the making of the said agreement, she the plaintiff became and was and from thence hitherto had been of sound mind, and had been and was legally discharged from the said lunatic asylum.

She also demurred to the third plea, the ground of demurrer stated in the margin being, "that the fact of the plaintiff having been legally in a lunatic asylum is no justification for the breach of the defendant's promise." Joinder.

The defendant demurred to the second replication to the third plea, the ground of demurrer stated in the margin being, "that the replication confesses the allegations in the defendant's plea, and it is no sufficient ground of reply, that, before the agreement, the plaintiff became of sound mind, and was legally discharged from the lunatic asylum." Joinder.

Macnamara, for the plaintiff.

purposes to insist upon approaching death as creating a peculiar legal position, it would be difficult to establish a rule which would settle the degree of approaching death, and more difficult to ascertain by evidence when the case was within that degree."

The principal case was overruled, and Spiers v. Hunt, supra, approved, in Wilson v. Carnley (Court of Appeals) 24 L. T. R. 277 (1908). See, also, note criticising principal case in 21 Harv. Law Rev. 58.

Overend, Q. C. (with whom was Daly), contra. The object of this sort of contract is as well to acquire the close intimacy of a companion for life as the lawful propagation of the species. This object would evidently be not only entirely frustrated, but would probably entail mischief on the community by perpetuating hereditary disease of the most painful character, if such a defense as this were not allowable. A person afflicted with such a malady,—a recurrence of which is always to be apprehended,—can never be fit properly to discharge the duties of a wife and a mother. There can be no good reason why sanity should not be as much an implied exception in such a contract as chastity.

Earle, C. J. The general doctrine laid down by the Exchequer Chamber, in the case referred to,[18] is, that the contract binds, and that want of chastity is the only exception. That being so, I think we are bound to hold that the third plea of the defendant in this case affords no answer, and consequently there must be judgment for the plaintiff.

Williams, J. I am entirely of the same opinion. No fraud is alleged.[19]

The rest of the court concurring.

Judgment for the plaintiff.[20]

[18] The case referred to is Beachy v. Brown, 1 El., Bl. & El. 796 (1860). Cockburn, C. J., in this case said: "I agree that there are many things which a man might desire to have communicated to him, if they existed, at the time of making the contract, such as that the plaintiff is in debt, or subject to other liabilities, or some circumstances relating to her person, her temper, her disposition, the discovery of which would yet not entitle the defendant to refuse to fulfil his engagement. It might be right to disclose such things; and yet it has never been held that the discovery of them justified a party in breaking his contract. Where it turns out that a woman is of unchaste conduct, which goes to the very root of the contract of marriage, there, from the excess and necessity of the case, the man is released from his contract. But nothing of the sort is disclosed here; there is no imputation on the virtue or honour of the plaintiff, and the case does not fall within the principle which makes the misconduct of the woman an answer to the action."

[19] In regard to what constitutes fraud or fraudulent concealment, see Van Houton v. Morse, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. Rep. 373 (1894), where Morton, J., said: "The jury were correctly instructed that it was not the duty of a party, before making or accepting an offer of marriage, to communicate all the previous circumstances of his or her life, and that the parties would be bound, if they became engaged without making any investigations, and without receiving any assurance or representations which led to the engagement, even though matters were discovered subsequently, which, if known at the time, would have prevented the engagement, unless they were such as gave a right to the other party to terminate the contract upon their discovery. Whether the only matters which would give the defendant such a right were those relating to the chastity of the plaintiff, we have no need now to consider. * * * And later they were told that the defendant was not bound if the contract was procured by deception or by fraud, or by concealment which was fraud, but that there was no fraudulent concealment by simply not communicating infor-

[20] See note 20 on following page.

IV. Subject Notes

(A) Whether the Action for Breach of Promise Survives

In the early and leading case of Chamberlain v. Williamson, 2 Maule & S. 408 (1814), Lord Ellenborough held that the action did not survive the death of plaintiff, where the declaration contained no allegation of special damage. Following this case, it has generally been held that the action does not survive the death of either plaintiff or defendant. Stebbins v. Palmer, 1 Pick. 71, 11 Am. Dec. 146 (1822), rule not changed by St. 1842, c. 89, according to Smith v. Sherman, 4 Cush. (Mass.) 408 (1849); Grubb v. Sult, 73 Va. 203, 34 Am. Rep. 765 (1879); Hayden v. Vreeland, 37 N. J. Law, 372, 18 Am. Rep. 723

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mation, that a promise would be valid, though made in complete ignorance of the antecedents of the parties, but that there was a different doctrine where matters were inquired about, and that, if either party made inquiries of the other with reference to family, position, or circumstances in the life or experience of the other, then, if willful false statements were made with reference to any of those things which might fairly be considered as entering into the judgment of either party as to whether that party would or would not enter into a contract of marriage, then there would be a false representation. 'That is,' the court continued, 'a statement which the party knows is false, or makes as true of his or her own knowledge, when it is in fact untrue, and without knowing that it is true, or if there is concealment of any such particular which is inquired about, those circumstances will be sufficient to make void a contract entered into in consequence and relying upon them, unless they are of such a nature that no man would be justified in the exercise of any reasonable care in relying upon these statements.' These instructions might, and probably would lead the jury to infer that concealment on the part of the plaintiff would not constitute fraud, except as to matters that were inquired about by the defendant. But we think that if the plaintiff undertook, without inquiry from the defendant, to state facts relating to any circumstances in her history or life, or to her parentage or family, or to her former or present position, which were material, she was bound not only to state truly the facts which she narrated, but she was also bound not to suppress or conceal any facts which were necessary to a correct understanding on the part of the defendant of the facts which she stated; and if she willfully concealed and suppressed such facts and thereby led the defendant to believe that the matters to which such statements related were different from what they actually were, she would be guilty of a fraudulent concealment. Kidney v. Stoddard, 7 Metc. 252; Short v. Currier, 153 Mass. 182 [26 N. E. 444]; Burns v. Dockray, 156 Mass. 135, 137 [30 N. E. 551]; Prentiss v. Russ, 16 Me. 30; Atwood v. Chapman, 68 Me. 38, 40, 41 [28 Am. Rep. 5]; Potts v. Chapin, 133 Mass. 276; Clark v. Baird, 9 N. Y. 183; Brown v. Montgomery, 20 N. Y. 287 [75 Am. Dec. 404]; Devoe v. Brandt, 53 N. Y. 462; Hill v. Gray, 1 Stark. 434; Stevens v. Adamson, 2 Stark. 422; Arkwright v. Newbold, 17 Ch. D. 301, 317, 318; Aortson v. Ridgway, 18 Ill. 23; Add. Torts (Wood's Edition) 1205. Mere silence on the part of the plaintiff, without inquiry by the defendant, though resulting in the concealment of matters, which would have prevented the engagement if known, would not constitute fraud on her part. Potts v. Chapin, ubi supra. But a partial and fragmentary disclosure, accompanied by the willful concealment of material and qualifying facts, would be as much of a fraud as actual misrepresentation, and in effect would be misrepresentation. Arkwright v. Newbold, ubi supra."

Van Houten v. Morse is also reported in 26 L. R. A. 430, with a note on "Effect of Fraudulent Concealment to Avoid Promise of Marriage."

[20] On disease or illness as an excuse for nonperformance of the promise to marry, see the cases cited below. The following cases hold that the diseases mentioned, whether in plaintiff or defendant, if unknown to the other party, at the time of promise, constitute no defense: Hall v. Wright, 1 El., Bl. &

(1875); Hovey v. Page, 55 Me. 142 (1867); Lattimore v. Simmons, 13 Serg. & R. (Pa.) 183 (1825); Frazer v. Boss, 66 Ind. 1 (1879), construing 2 Rev. St. 1876, p. 309, § 783; Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336 (1871); Wade v. Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250 (1874); Weeks v. Mays, 87 Tenn. 442, 10 S. W. 771, 3 L. R. A. 212 (1889), construing Milliken & V. Code, § 3560; Hullett v. Baker, 101 Tenn. 689, 49 S. W. 757 (1899), construing Shannon's Code, § 4569; Larocque v. Conheim, 42 Misc. Rep. 613, 87 N. Y. Supp. 625 (1904).

In the following cases it was held that the action survived: Shuler v. Millsaps 71 N. C. 297 (1874), and Allen v. Baker, 86 N. C. 91, 41 Am. Rep. 444 (1882), construing Battle's Rev. St. c. 17, § 65; Stewart v. Lee, 70 N. H. 181, 46 Atl. 31 (1899), construing Pub. St. 1891, c. 191, §§ 8–14. And in Johnson v. Levy, 118 La. 447, 43 South. 46, 118 Am. St. Rep. 378, 9 L. R. A. (N. S.) 1020, 10 Ann. Cas. 722 (1907), it was held that the action survived where promisor was put in default by demand. See note to this case in 9 L. R. A. (N. S.) 1020.

(B) Damages in Suits for Breach of Promise

As to the various elements of damages, injury to feelings, reputation, loss of time, expenses incurred in preparation, loss of reasonable expectation, etc., see the following cases: Tobin v. Shaw, 45 Me. 331, 71 Am. Dec. 547 (1858); Smith v. Sherman, 4 Cush. (Mass.) 408 (1849); Harrison v. Swift, 13 Allen (Mass.) 144 (1866); Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936 (1883); Ortiz v. Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581 (1895); Poehlmann v. Kertz, 105 Ill. App. 249 (1902), affirmed in 204 Ill. 418, 68 N. E. 467 (1903); Grubbs v. Pence, 73 S. W. 785, 24 Ky. Law Rep. 2183 (1903); Graves v. Rivers, 123 Ga. 224, 51 S. E. 318 (1905).

To the effect that evidence of defendant's reputation for wealth is admissible on the question of damages, see Hunter v. Hatfield, 68 Ind. 416 (1879); Bennett v. Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442 (1880); Stratton

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El. 746 (1858) (bleeding of the lungs); Smith v. Compton, 67 N. J. Law, 548, 52 Atl. 386, 58 L. R. A. 480 (1902) (urinary complaint).

Contra: Sanders v. Coleman, 97 Va. 690, 34 S. E. 621, 47 L. R. A. 581 (1899) (urinary complaint); Shackleford v. Hamilton, 93 Ky. 80, 19 S. W. 5, 15 L. R. A. 531, 40 Am. St. Rep. 166 (1892), (syphilis); Allen v. Baker, 86 N. C. 91, 41 Am. Rep. 444 (1882) (venereal disease); Gardner v. Arnett, 50 S. W. 840, 21 Ky. Law Rep. 1 (1899) (syphilis); Kantzler v. Grant, 2 Ill. App. 236 (1878) (venereal disease); Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. Rep. 302 (1900) (venereal disease).

See, also, Gring v. Lerch, 112 Pa. 244, 3 Atl. 841, 56 Am. Rep. 314 (1886), where structural malformation was held an excuse; Goddard v. Westcott, 82 Mich. 180, 46 N. W. 242 (1890), where physical incapacity (nature not disclosed) was held an excuse; Edmonds v. Hughes, 115 Ky. 561, 74 S. W. 283, 24 Ky. Law Rep. 2467 (1903), where a voluntary submission to an unnecessary surgical operation by plaintiff, whereby she became incapable of procreation, was held to excuse defendant; and Grover v. Zook, 44 Wash. 489, 87 Pac. 638, 7 L. R. A. (N. S.) 582, 120 Am. St. Rep. 1012, 12 Ann. Cas. 192 (1906), where defendant became engaged to plaintiff with full knowledge that plaintiff had consumption in an incurable form, and it was held that defendant was excused on grounds of public policy.

See comment on Grover v. Zook, in 7 Col. Law Rev. 135. Also see note in 16 Harv. Law R. 604, suggesting a classification of disease for the purpose of defense, and 37 Am. Law Rev. 226, article by C. H. Huberich on "Venereal Disease in the Law of Marriage and Divorce."

A collection of cases on ill health as a defense to an action for breach of promise to marry, and a discussion of the subject, may also be found in a note to Grover v. Zook, supra, in 7 L. R. A. (N. S.) 582.

v. Dole, 45 Neb. 472, 63 N. W. 875 (1895); Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784 (1891); Jacoby v. Stark, 205 Ill. 34, 68 N. E. 557 (1903).

Contra: Johansen v. Modahl, 4 Neb. (Unof.) 411, 94 N. W. 532 (1903).

Plaintiff may show circumstances of contumely and aggravation attending the breach of the promise, as fact that friends have been invited to the wedding, Reed v. Clark, 47 Cal. 194 (1873); slanderous statements of defendant, Chesley v. Chesley, 10 N. H. 327 (1839).

The seduction of plaintiff by virtue of the promise may also be shown to aggravate the damages. Tubbs v. Van Kleek, 12 Ill. 446 (1851); Haymond v. Saucer, 84 Ind. 3 (1882); Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336 (1871); Wilber v. Johnson, 58 Mo. 600 (1875); Kniffen v. McConnell, 30 N. Y. 285 (1864); Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197, 114 Am. St. Rep. 185, 5 Ann. Cas. 103 (1906); Sramek v. Sklenar, 73 Kan. 450, 85 Pac. 566 (1906), etc.

Contra. Perkins v. Hersey, 1 R. I. 493 (1851); Wrynn v. Downey, 27 R. I. 454, 63 Atl. 401, 4 L. R. A. (N. S.) 615, 114 Am. St. Rep. 63, 8 Ann. Cas. 912 (1906); Weaver v. Bachert, 2 Pa. 80, 44 Am. Dec. 159 (1845).

Where defendant in bad faith tried to prove that plaintiff was unchaste and entirely failed, it was held that this might be considered in aggravation of damages. Fleetford v. Barnett, 11 Colo. App. 77, 52 Pac. 293 (1898); Liese v. Meyer, 143 Mo. 547, 45 S. W. 282 (1898). In Kaufman v. Fye, 99 Tenn. 145, 42 S. W. 25 (1897), it was so held, although the charge was made in good faith. See note criticising the case in 11 Harv. Law Rev. 268.

To mitigate damages defendant may show that plaintiff's loss is less than claimed, as by showing that plaintiff is unchaste, Clark v. Reese, 26 Tex. Civ. App. 619, 64 S. W. 783 (1901); that defendant is inflicted with an incurable disease, Sprague v. Craig, 51 Ill. 288 (1869). Whether defendant may show that after breach he renewed his offer of marriage is doubtful. That he can, see Kelly v. Renfro, 9 Ala. 325, 44 Am. Dec. 441 (1846); Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275 (1881). That he cannot: Holloway v. Griffith, 32 Iowa, 409, 7 Am. Rep. 208 (1871); Bennett v. Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442 (1880).

(C) When the Right to Sue Accrues; Statute of Limitation

Where the promise is to marry at a fixed time, and the promise is renounced before the time fixed, it is generally held that suit may be brought at once, following the leading case of Frost v. Knight, L. R. 7 Ex. 111 (1872). See, to this effect, Sheahan v. Barry, 27 Mich. 217 (1873); Burtis v. Thompson, 42 N. Y. 246, 1 Am. Rep. 516 (1870); Holloway v. Griffith, 32 Iowa, 409, 7 Am. Rep. 208 (1871); Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275 (1881); Adams v. Byerly, 123 Ind. 368, 24 N. E. 130 (1890); Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385 (1900); Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914 (1900); Burke v. Shaver, 92 Va. 345, 23 S. E. 749 (1895); Kennedy v. Rodgers, 2 Kan. App. 764, 44 Pac. 47 (1896); Zatlin v. Davenport, 71 Ill. App. 292 (1897); Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197, 114 Am. St. Rep. 185, 5 Ann. Cas. 103 (1906).

Some of the cases above base the decision upon the doctrine of anticipatory breach as laid down generally in Hochster v. De la Tour, 2 El. & Bl. 678 (1853). Others, while dissenting from the general doctrine of anticipatory breach, apply it to promises to marry.

Suit may also be brought at once, where defendant disables himself (as by marriage to another) from carrying out his promise. Short v. Stone, 8 Q. B. 358, 15 L. J. Q. B. 143 (1846); Clements v. Moore, 11 Ala. 35 (1847); Sheahan v. Barry, 27 Mich. 217 (1873); Hunter v. Hatfield, 68 Ind. 416 (1879); Schroeder

v. Michal, 98 Mo. 43, 11 S. W. 314 (1889); McCarville v. Boyle, 89 Wis. 651, 62 N. W. 517 (1895); Kerns v. Hagenbuehle, 60 N. Y. Super. Ct. 222, 17 N. Y. Supp. 367 (1892); Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914 (1900).

Where no time for performance is fixed, the right to sue accrues after a reasonable time. Stevenson v. Pettis, 12 Phila. 468 (1877); Blackburn v. Mann, 85 Ill. 222 (1877). It was also held in the latter case that, where the parties through a period of years treat the contract as a continuing one, no right to sue accrues until one of the parties breaks the engagement.

The period of limitation begins to run from the time of breach, and not from the time of contract. Hanson v. Elton, 38 Minn. 493, 38 N. W. 614 (1888); Buelna v. Ryan, 139 Cal. 630, 73 Pac. 466 (1903).

SECTION 2.—MARRIAGE AS A CONTRACT OR RELATION

I. Nature of Marriage

N. Y. CONSOL. LAWS 1909, c. 14, § 10: "Marriage, so far as its validity in law is concerned, continues to be a civil contract,[21] to which the consent of parties capable in law of making a contract is essential."

[21] Many other states have statutes declaring that marriage is a "civil contract," or that it is a personal relation growing out of a civil contract. For a few of these statutes see: Colorado, 2 Mills' Ann. St. 1891, § 2988; Georgia, Civ. Code 1895, § 2412; Iowa, Code 1897, § 3139; Louisiana, Rev. Civ. Code, art. 90; Michigan, 3 Comp. Laws 1897, § 8589; Minnesota, Rev. Laws 1905, § 3552; Missouri, Rev. St. 1899, § 4311; Oklahoma, St. 1903, § 3482; Wisconsin, Rev. St. 1898, § 2328.

On the nature of marriage, see, also, Randall v. Kreiger, 23 Wall. 137, at page 147, 23 L. Ed. 124 (1874), where Swayne, J., said: "Marriage is an institution founded upon mutual consent. That consent is a contract, but it is one sui generis. Its peculiarities are very marked. It supersedes all other contracts between the parties, and with certain exceptions it is inconsistent with the power to make any new ones. It may be entered into by persons under the age of lawful majority. It can be neither cancelled nor altered at the will of the parties upon any new consideration. The public will and policy controls their will. An entire failure of the power to fulfill by one of the parties, as in cases of permanent insanity, does not release the other from the pre-existing obligation. In view of the law it is still as binding as if the parties were as they were when the marriage was entered into. Perhaps the only element of a contract, in the ordinary acceptation of the term, that exists is that the consent of the parties is necessary to create the relation."

See, also, Ditson v. Ditson, 4 R. I. 87, at page 101 (1856), where Ames, C. J., said: "Now, marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these uncontrollable by any contract which they can make. When formed, this relation is no more a contract than 'fatherhood' or 'sonship' is a contract. It is no more a contract than serfdom, slavery, or apprenticeship are contracts, the latter of which

BURNS' IND. ANN. ST. 1908, § 7289: "Marriage is declared to be a civil contract, into which males of the age of eighteen and females of the age of sixteen, not nearer of kin than second cousins, and not having a husband or a wife living, are capable of entering."

CAL. CIV. CODE, § 55 (as amended by Laws 1895, p. 121): "Marriage is a personal relation arising out of a civil contract to which the consent of parties capable of making that contract is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization authorized by this code."

II. Formality

(A) At Common Law and under Statute

DUMARESLY v. FISHLY.

(Court of Appeals of Kentucky, 1821. 3 A. K. Marsh. 368.)

The Chief Justice delivered the opinion.

This was an action for slanderous words. The defendant pleaded that the plaintiff is and was, at the emanation of the writ, his lawful wife; to which the plaintiff replied, traversing the allegations of the plea, and issue was thereupon joined to the country.

it resembles in this, that it is formed by contract. To this relation there are two parties, as to the others, two or more, interested without doubt in the existence of the relation, and so interested in its dissolution."

And in Noel v. Ewing, 9 Ind. 37, at page 49 (1857), Stuart, J., used the following language: "Some confusion has arisen from confounding the contract to marry with the marriage relation itself. And still more is engendered by regarding husband and wife as strictly parties to a subsisting contract. At common law, marriage as a status had few elements of contract about it. For instance, no other contract merged the legal existence of the parties into one. Other distinctive elements will readily suggest themselves, which rob it of most of its characteristics as a contract, and leave it simply as a status or institution. As such, it is not so much the result of private agreement, as of public ordination. In every enlightened government, it is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity. Hence, as between husband and wife, there is no constitutional provision protecting the marriage itself, or the property incident to it, from legislative control, by general law, upon such terms as public policy may dictate. The sovereign power may, by general enactment, regulate and mold their relative rights and duties at pleasure."

For other comment on the nature of marriage, see Keyes v. Keyes, 22 N. H. 553 (1851), Adams v. Palmer, 51 Me. 480 (1863), and especially Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654 (1888), in which case, and other cases cited therein, it was held that marriage is not a contract within the meaning of the clauses in the federal and state Constitutions forbidding legislation impairing the obligation of contracts.

On the trial of the issue in the circuit court, it appeared from the evidence that, some time previous to the commencement of the suit, a license for the marriage of the plaintiff and defendant had been issued by the clerk of the county court of Jefferson county, with the consent of plaintiff's father, and that the marriage ceremony was performed at the house of her father in Jeffersonville, in the state of Indiana, where she resided, by the reverend Mr. Chabrat, a priest of the Roman Catholic religion, who had previously obtained from the county court of Nelson county in this state, where he resided, a testimonial authorizing him to celebrate the rites of matrimony; but that the defendant declined cohabiting with the plaintiff, and that the marriage had not been consummated.

After the evidence was closed on both sides, the counsel for the defendant moved the court to instruct the jury, that if they believed the whole evidence in relation to the intermarriage of the plaintiff with the defendant, and that the marriage had been celebrated between the plaintiff and defendant before the commencement of this suit at Jeffersonville, in the state of Indiana, and not in Jefferson county in this state, the marriage was nevertheless valid, and that in that case they should find for the plaintiff. The court, with the assent of the plaintiff, reserved the point, not being prepared to give an opinion, and the jury gave a verdict for the plaintiff, subject to that opinion. The court, after taking time to consider, decided that the law was for the defendant on the point reserved, and rendered judgment accordingly; to which the plaintiff excepted, spreading the whole evidence in detail upon the record, and has brought the case to this court by an appeal.

As the marriage was entered into in the state of Indiana, the question in relation to its validity, must, no doubt, be decided by the laws of that state. Whether, however, we consider the question with reference to the laws of Indiana or this country, the result will be the same. For the statute of that country, regulating marriages, which was read on the trial in the circuit court, and made a part of the record by the bill of exceptions, appears, as to its effect upon the point now in controversy, not to differ materially from the statute of this country upon the same subject, and the common law is in force in that as well as in this country, so far as it has not been altered or repealed by statute. It is obvious that the marriage between the parties in this case was not celebrated according to the provisions of the statute of either country. It was not done according to the provisions of the statute of this country, because the female party did not reside in the county, from the clerk's office of which the license was issued; and it was not done according to the statute of Indiana, because the license was not issued by the proper officer of that state.

But neither the statute of Indiana nor that of this state avoids a marriage not celebrated according to its provisions. The object of

the legislature of both states was manifestly, not to declare what should be requisite to the validity of a marriage, but to provide a legitimate mode of solemnizing it; for the legislature speaks not of the validity of the marriage, but of the celebration of its rite, and addresses itself, not to the parties themselves, but to the functionaries whom it authorizes to perform the requisite ceremonies in solemnizing the marriage. In short, the legislature of either state has done nothing more than substitute a statutory mode of solemnizing the rites of matrimony, instead of the common law mode of doing it in facie ecclesiæ; and it was necessary to do this, because there was in this country no church established by law, and consequently none that had authority to solemnize the rites of matrimony. The effect, therefore, of the statutory mode of solemnizing matrimony must be precisely the same, with respect to the validity of a marriage in this country, as the common law mode with respect to the validity of a marriage in England. We are then led to enquire what the doctrine of the common law is, upon this subject.

Marriage is nothing but a contract; and to render it valid, it is only necessary, upon the principles of natural law, that the parties should be able to contract—willing to contract, and should actually contract. A marriage thus made without further ceremony, was, according to the simplicity of the ancient common law, deemed valid to all purposes and such continued to be the law of England until the time of Pope Innocent the Third, when the ceremony of celebrating matrimony in facie ecclesiæ was first introduced into that country. That ceremony, however, though introduced by the usurpation of the church, was afterwards recognised to a certain extent by the common law; and it would have been idle for the law to have recognised the ceremony without attaching to it any legal consequence. It was therefore held, that to constitute a marriage de jure, and render it valid to every purpose, it must be celebrated in the church. But a marriage contracted without that ceremony, was, nevertheless, a marriage in fact, and was still deemed valid to most purposes. Baron and Feme 3, 4, and 5, 2 Salk. 437, and 2 Black. Com. 439; Johnson's Rep. 52.

Even in the ecclesiastical courts, a marriage de facto was not held to be void; for if the parties afterwards cohabited, they were not liable to be punished for fornication; and if either of them married another, such second marriage, though celebrated in facie ecclesiæ in due form, was deemed void ab initio.

And if in those tribunals by whose encroachments upon the civil authority, the ceremony of solemnizing in facie ecclesiæ was introduced, a marriage without that ceremony was deemed valid to some purposes, we would naturally expect that the courts of common law would regard such a marriage with still more indulgence. We accordingly find that, except in certain real actions, it was held not to be necessary to place a marriage de jure. For it was only in those

cases that the plea of ne ungues accouple in loyal matrimony which put in issue, the legality of the marriage was admissible. In all personal matters and causes, a marriage de facto was sufficient, and in such cases the plea of ne ungues accouple in loyal matrimony was inadmissible. Baron and Feme, 44, 45.

Hence in the case of Alleyn and wife against Gray, 2 Salk. 437, which was an action of debt on a bond, the plea of ne ungues accouple in loyal matrimony was held bad on demurrer, not only because it changes the mode of trial, but because it admits a marriage but denies the legality of it; whereas, a marriage de facto is sufficient, and whether legal or not legal, is not material. So in an action of trespass brought by A against B and C. B pleaded that C is the wife of the plaintiff, and demanded judgment of the writ. The plaintiff replied ne ungues accouple in loyal matrimony, which was held bad, and he was driven to say she was not his wife, for if she was his wife in fact, it was sufficient. Baron and Feme, ubi supra.

So in an action for criminal conversation, it is sufficient to prove a marriage in fact, though the evidence arising from cohabitation and reputation is not admissible to prove such marriage. And even in an indictment for bigamy, a marriage in fact is sufficient to warrant a conviction in case of a record marriage. Com. Dig. tit. Baron and Feme, letter B, and the cases there cited.

In fine, in every shape in which the question has been presented to the courts of common law in personal actions, or in relation to personal matters, a marriage in fact has been deemed valid. A contrary doctrine, in this country, would be attended with the most mischievous consequences. The statute prescribing the mode of celebrating the rites of matrimony, requires that when either party is under the age of twenty-one, the consent of the parent or guardian shall be given in person or in writing, that bond and security shall be given before license can be issued; that license shall be issued only by the clerk of the county where the female party resides; and that no clergyman who has not previously obtained testimonials for that purpose from the county court, shall celebrate the rites of matrimony. A compliance with the whole of these particulars is necessary to render the marriage conformable to the statute; and a failure to comply with any one of them, would render it but a marriage in fact; and if a marriage in fact be void, many of the marriages of the country would be so, for there are many in which there has been a failure either intentionally or otherwise, to comply with some one or more of the formalities presented by the statute. A doctrine which would thus tend to vitiate a great proportion of the marriages of the country would result in incalculable evils, and cannot be admitted to be correct.

But admitting a marriage in fact to be valid, it is contended that to constitute such a marriage, consummation is necessary; and

it is inferred, as the marriage in this case was not consummated by cohabitation, that it does not amount even to a marriage in fact.

The position assumed in this argument is absolutely untenable. It is neither founded on reason nor supported by authority. By the law of nature, the contract of marriage is complete without consummation. 1 Rutherford's Inst. 345; and it is a maxim of the common law, borrowed, it is true, from the civil law, but founded upon the reason and nature of the thing, "that consensus, non concubitus facit matrimonium." Co. Lit. 34; 1 Black. Com. 433.[22]

Marriage and cohabitation are two things. The latter is the object to be obtained by the former, and to make it lawful, must be preceded by the former. It is said, indeed, that a marriage contracted per verba de futuro, which is in truth nothing but a promise to marry in future, is a valid marriage if the parties afterwards cohabit; but the cohabitation, even in that case, does not constitute the marriage. It is only evidence of the marriage; and the same authorities which say that a contract per verba de futuro becomes a marriage if the parties afterwards cohabit, invariably lay down the doctrine that a marriage per verba de præsenti is, forthwith, a marriage, and complete without cohabitation.

Upon the whole, therefore, a majority of the court are of opinion that it was sufficient for the defendant to support the issue on his part, to prove a marriage in fact; and that the marriage proved in this case was of that character.

The decision of the point reserved by the circuit court was, therefore, correct, and the judgment must be affirmed.

MILLS, J., dissented.[23]

[22] Accord: Dalrymple v. Dalrymple, 2 Hagg. Consist. 54 (1811); Jackson v. Winne, 7 Wend. (N. Y.) 47, 22 Am. Dec. 563 (1831); Port v. Port, 70 Ill. 484 (1873), semble; Hebblethwaite v. Hepworth, 98 Ill. 126 (1881), semble; Hilton v. Roylance, 25 Utah, 129, 69 Pac. 660, 58 L. R. A. 732, 95 Am. St. Rep. 821 (1902). However, a present assumption of the marriage status is necessary. McKenna v. McKenna, 180 Ill. 577, 54 N. E. 641 (1899); Lorimer v. Lorimer, 124 Mich. 631, 83 N. W. 609 (1900); Topper v. Perry, 197 Mo. 531, 95 S. W. 203, 114 Am. St. Rep. 777 (1906).

[23] The dissenting opinion of MILLS, J., is omitted. The following extract gives his point of view: "And it is said in Salk. 437, 438, that such is the rule of the canon law. This case in Salk. by mistake has been quoted as declaring it a rule of the common law by subsequent authorities. Assuming then the fact, that such a rule was incorporated into the common from the canon law, it was one of the effects produced by corrupt religious establishments, of the same character with the principle, that a marriage by the priest could never be dissolved by human authority. When we adopted the common law of England, it was only so far as suited our local situation, and was compatible with the genius and spirit of our government. I would, then, select from it the most sound and liberal principles, and cast away not only all the maxims of ecclesiastical establishments, but doubt and also reject such parts as were tainted by canonical mixtures. In a word, I would say that the common law on this point was corrupted by too long a subjection to spiritual usurpation, and that we did not adopt it into our code, and that it is not in this respect obligatory on the court. I would take this case as one primæ impressionis in this country, and subject it to the rules of all other contracts."

CHENEY v. ARNOLD (1857) 15 N. Y. 345, 69 Am. Dec. 609,[24] Denio, C. J.: "The plaintiff's counsel maintains that mutual promises to marry, followed by carnal intercourse, is a legal marriage, and that the judge consequently committed an error in submitting the question to the jury whether the engagement was that they would presently take each other as husband and wife, or whether it was executory in its character; as he maintains that in either case they became husband and wife from the time the intercourse commenced. I agree that there was nothing to be left to the jury, for there was no disputed question of fact. There was no agreement between the parties to become husband and wife in præsenti, but there was an agreement to be married in futuro, and that was followed by carnal intercourse; and if that constitutes a marriage by our law, they were married and the plaintiff is legitimate, otherwise she is not.

"There is a dictum by Judge Cowen, in Starr v. Peck, 1 Hill, 274, which fully sustains the plaintiff's position; but it was unnecessary to the decision. It was a case in which the jury were left to presume a marriage in fact, by which I understand a present contract, from the conduct of the parties; and the verdict affirmed the existence of a marriage. There was no evidence of a contract, present or future, and it was as easy for the jury to find the one as the

Cases holding that statutes, prescribing formalities and imposing penalties, are to be construed as directory only, are very numerous. Only a few are cited below. With a few exceptions all states have at one time or another recognized the so-called common-law marriage. See 2 Poll. & Mait. History of Eng. Law, 366–377; 1 Bl. 439; 1 Bishop, Mar., Div. and Sep. §§ 384–449. For exhaustive discussion of English law, see Queen v. Millis, 10 Cl. & F. 534 to 907 (1843).

The following American cases recognize informal marriages: Carmichael v. State, 12 Ohio St. 553 (1861); Port v. Port, 70 Ill. 484 (1873); Com. v. Stump, 53 Pa. 132, 91 Am. Dec. 198 (1866); Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164 (1875); Blanchard v. Lambert, 43 Iowa, 228, 22 Am. Rep. 245 (1876); Dyer v. Brannock, 66 Mo. 391, 27 Am. Rep. 359 (1877); Meister v. Moore, 96 U. S. 76, 24 L. Ed. 826 (1877); Teter v. Teter, 101 Ind. 129, 51 Am. Rep. 742 (1884); State v. Walker, 36 Kan. 297, 13 Pac. 279, 59 Am. Rep. 556 (1887); White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799 (1890); Bailey v. State, 36 Neb. 808, 55 N. W. 241 (1893); Hilton v. Roylance, 25 Utah, 129, 69 Pac. 660, 58 L. R. A. 723, 95 Am. St. Rep. 821 (1902); Reaves v. Reaves, 15 Okl. 240, 82 Pac. 490, 2 L. R. A. (N. S.) 353 (1905); Klipfel's Estate v. Klipfel, 41 Colo. 40, 92 Pac. 26, 124 Am. St. Rep. 96 (1907). And see notes in 2 L. R. A. (N. S.) 353, and 15 L. R. A. (N. S.) 463.

On common-law marriage as affecting bigamy, see note in 20 Harv. Law Rev. 576. On marriage of slaves, see Bish. Mar., Div. and Sep. §§ 646–679. note in 9 Harv. Law Rev. 223, and the following cases: Irving v. Ford, 179 Mass. 216, 60 N. E. 491 (1901); Waff v. Sessums, 28 Tex. Civ. App. 183, 66 S. W. 865 (1902); Johnson's Heirs v. Raphael, 117 La. 967, 42 South. 470 (1906); Middleton v. Middleton, 221 Ill. 623, 77 N. E. 1123 (1906); Ex parte Romans, 78 S. C. 210, 58 S. E. 614 (1907).

[24] This was an action by husband and wife, to recover a farm, claimed by plaintiffs, in the right of the wife. The case turned upon the legitimacy of the plaintiff, Mrs. Cheney. A verdict was rendered for defendant, and from a judgment thereon plaintiffs appealed. Judgment for defendant affirmed. Only part of the opinion is given.

other. What was said by the learned judge as to a contract per verba de futuro was obiter. Chancellor Kent also countenances the position of the plaintiff's counsel. He says: 'If the contract be made per verba de præsenti and remains without cohabitation, or if made per verba de futuro and be followed by consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary.' 2 Com. (2d Ed.) 86. Blackstone too says that in cases of cohabitation, contracts per verba de futuro were, before the marriage act, deemed valid marriages for many purposes, and the parties might be compelled, in the spiritual courts, to celebrate them in facie ecclesiæ. Notwithstanding these respectable opinions, I have not been able to assent to the proposition. With us marriage is simply a civil contract, differing, it is true, from contracts upon other subjects in the circumstance that it is not in the power of the parties to release or dissolve it, but partaking in many other particulars of the nature of common law contracts. It requires the existence of two parties, of different sexes, competent to contract, and an actual contract between them. Like other contracts, it may be in terms and intent executory or executed. If executed, that is, if the parties agree eo instanti to take each other for husband and wife, it is ipsum matrimonium. If executory in its terms it would not, by any analogy to common law contracts, create the relation of husband and wife. It would bind the parties to enter into these relations in future, and, viewed as an agreement to marry, it confessedly does furnish the basis of an action for damages. If it were like some other common law contracts, an action in the nature of a bill in equity might be sustained to enforce a specific performance. But the temporal courts in England never possessed a jurisdiction to enforce matrimonial contracts specifically, and we have no tribunals corresponding with the English ecclesiastical courts, which did formerly exercise such a jurisdiction. Burtis v. Burtis, Hopk. Ch. 557, 14 Am. Dec. 563. Our courts have all the jurisdiction of the English common law and equity courts which has not been denied them by the legislature, and such other jurisdiction as has been conferred upon them by statute. But as these English common law courts never had any authority to decree a marriage upon the ground of an executory contract to marry, and we have no statute creating such a jurisdiction, it follows that if parties agree to marry and one of them refuse to perform the agreement, no power exists in our courts to compel a performance. So far, then, as the analogies between agreements to marry and other executory contracts carry us, the only effect of the former is to lay the foundation for an action for damages in case of a breach. Carnal intercourse without marriage does not create any legal relation between the parties or confer any rights upon the issue of such connection. * * * It follows that the doctrine of the canon law, that a contract of marriage per

verba de futuro, followed by carnal intercourse, was a valid marriage, did not become the law of this state by force of our adoption of the common law of England, for it was not a part of that common law." [25]

HULETT v. CAREY.

(Supreme Court of Minnesota, 1896. 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. Rep. 419.)

MITCHELL, J.[26] Nehemiah Hulett, for many years a resident of St. Louis county, and generally supposed and reputed to be a bachelor, died July 25, 1892. Proceedings were duly had in the probate court of that county, whereby a will which he had executed in May, 1862, was proved and admitted to probate on October 10, 1892, and John R. Carey appointed administrator with the will annexed. On February 13, 1893, the respondent, under the name of Lucy A. Hulett, presented her petition to the probate court, alleging that she was the widow of Hulett, that she was married to him on January 6, 1892, and praying that the homestead of the deceased be set apart to her, and that she be allowed to select certain personal property, pursuant to the statutes in such case made and provided. On September 13, 1893, she presented another petition to the probate court reiterating her marriage to the deceased, and praying that the probate of the will be vacated and set aside and declared not to be the last will and testament of the deceased. In this petition she al-

[25] See 1 Bish. Mar., Div. & Sep. § 370 et seq., for criticism of the principal case, compare statement of Deady, J., in Holmes v. Holmes, 1 Abb. (U. S.) 525, at 538, Fed. Cas. No. 6,638 (1870): "Assuming the promise per verba de futuro to be so proved, it is maintained that this engagement and the subsequent copula amount in law to a present consent, and constitute sufficient evidence of marriage. The reason assigned for this conclusion is, that the law assumes the copula was allowed on the faith of the marriage promise; and that so the parties, at the time of the copula, accepted each other as husband and wife. The proposition is substantially stated in the words of Bishop on Marriage and Divorce, § 90, where it is laid down that in the absence of any statute requiring specified forms and ceremonies, a marriage is constituted by the mere consent of the parties, and that such consent is to be presumed when the copula follows upon a promise to marry in the future. But this doctrine is directly denied in Cheney v. Arnold, 15 N. Y. 345 [69 Am. Dec. 609]. * * * It must be admitted that there are some dicta of American jurists to the contrary of this case, and in accord with the rule maintained by Bishop; but Cheney v. Arnold is later than these dicta, and carries with it the authority of an express adjudication. This is a vexed question, but I am much inclined to follow the opinion expressed by Chancellor Walworth in Rose v. Clark, 8 Paige Ch. (N. Y.) 579, that at common law no marriage was valid unless celebrated in facie ecclesiæ."

For varying statements concerning marriage per verba de futuro compare the following: Richard v. Brehm, 73 Pa. 140, 13 Am. Rep. 733 (1873); Duncan v. Duncan, 10 Ohio St. 181 (1859); Peck v. Peck, 12 R. I. 485, 34 Am. Rep. 702 (1880); Port v. Port, 70 Ill. 484 (1873); Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105 (1887); Reg. v. Millis, 10 Cl. & F. 534, 782 (1843); Hooper v. McCaffery, 83 Ill. App. 341 (1898).

[26] Part of the opinion is omitted.

leged that she and the deceased were married by mutual consent, but without any formal solemnization, and that in evidence of such marriage a certain instrument in writing was executed by both parties at the time of the contract of marriage.

Both petitions alleged, and it is an admitted fact, that Hulett died without issue, and that no issue was ever born of the alleged marriage between him and the petitioner. The only ground here material, on which it was asked that the probate of the will be vacated, was that it was revoked by the marriage of Hulett to the petitioner subsequent to its execution. The administrator, the devisees and legatees under the will, and the heirs at law of the deceased all opposed the granting of the petitions; their main contention being that the petitioner had never been married to the deceased. It appeared on the hearings before the probate court that the foundation of the petitioner's claim to be the widow of the deceased was the following instrument, alleged to have been executed by her and the deceased on January 7, but by mistake dated January 6, 1892: "Contract of marriage between N. Hulett and Mrs. L. A. Pomeroy. Believing a marriage by contract to be perfectly lawful, we do hereby agree to be husband and wife, and to hereafter live together as such. In witness whereof we have hereunto set our hands the day and year first above written. [Signed] N. Hulett. L. A. Pomeroy." The probate court decided adversely to the petitioner, and denied both her petitions, whereupon she appealed to the district court in both cases.

Inasmuch as the main, if not the only, issue in both appeals was whether there had been a valid common-law marriage between the petitioner and the deceased, both were tried together. * * *

The second finding of fact in each case was to the effect that the deceased and the petitioner were husband and wife, the only difference being that in the one appeal the finding was that they were such on the 7th of January, 1892 (the date of the execution of the marriage contract), and on the 25th of July, 1892 (the date of Hulett's death), while in the other appeal the finding was that they became husband and wife on the 7th of January, 1892; the difference in the two findings being, in our opinion, immaterial. The court held, as conclusions of law, in the one appeal, that the petitioner was entitled, as widow, to an order setting apart to her the homestead of the deceased, etc.; and, in the other, that the will of Hulett, executed in 1862, was revoked by his subsequent marriage to the petitioner. It is to this second finding of fact and to this last conclusion of law that the appellants take exception, and this presents the two principal questions raised by these appeals.

The respondent had been for a long time prior to the execution of the marriage contract in the employment of Hulett as housekeeper at his farm at Stoney Point, some miles out of the city of Duluth. Her testimony is that immediately after the execution of this contract

she moved into his room, and that from henceforth until his death they occupied the same sleeping apartment, and cohabited together as husband and wife. But she admits that it was agreed between them that their marriage was to be kept secret until they could move into Duluth, and go to housekeeping in a house which Hulett owned in that city. While a feeble effort was made to prove that their marital relation had become known to one or two persons, yet we consider the evidence conclusive that their marriage contract was kept secret, that they never publicly assumed marital relations, or held themselves out to the public as husband and wife, but, on the contrary, so conducted themselves as to leave the public under the impression that their former relations of employer and housekeeper remained unchanged.

Upon this state of facts the contention of the appellants is that there was no marriage, notwithstanding the execution by them of the written contract; that, in order to constitute a valid common-law marriage, the contract, although in verba de præsenti, must be followed by habit or reputation of marriage,—that is, as we understand counsel, by the public assumption of marital relations. We do not so understand the law.

The law views marriage as being merely a civil contract, not differing from any other contract, except that it is not revocable or dissoluble at the will of the parties. The essence of the contract of marriage is the consent of the parties, as in the case of any other contract; and, whenever there is a present, perfect consent to be husband and wife, the contract of marriage is completed. The authorities are practically unanimous to this effect. Marriage is a civil contract jure gentium, to the validity of which the consent of parties able to contract is all that is required by natural or public law. If the contract is made per verba de præsenti, and remains without cohabitation, or if made per verba de futuro, and be followed by consummation, it amounts to a valid marriage, in the absence of any civil regulations to the contrary. 2 Kent, Comm. p. 87; 2 Greenl. Ev. § 460; 1 Bish. Mar. & Div. §§ 218, 227–229. The maxim of the civil law was "Consensus non concubitus facit matrimonium." The whole law on the subject is that, to render competent parties husband and wife, they must and need only agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status. If cohabitation follows, it adds nothing in law, although it may be evidence of marriage. It is mutual, present consent, lawfully expressed, which makes the marriage. 1 Bish. Mar. Div. & Sep. §§ 239, 313, 315, 317. See, also, the leading case of Dalrymple v. Dalrymple, 2 Hagg. Consist. 54, which is the foundation of much of the law on the subject.

An agreement to keep the marriage secret does not invalidate it, although the fact of secrecy might be evidence that no marriage ever took place. Dalrymple v. Dalrymple, supra. The only two cases

which we have found in which anything to the contrary was actually decided are Reg. v. Millis, 10 Clark & F. 534, and Jewell v. Jewell, 1 How. 219, 11 L. Ed. 108, the court in each case being equally divided. But these cases have never been recognized as the law, either in England or in this country.

Counsel for appellants contend, however, that the law is otherwise in this state; citing State v. Worthingham, 23 Minn. 528, in which this court used the following language: "Consent, freely given, is the essence of the contract. A mutual agreement, therefore, between competent parties, per verba de præsenti, to take each other for husband and wife, deliberately made, and acted upon by living together professedly in that relation, is held by the great weight of American authority sufficient to constitute a valid marriage with all its legal incidents"; citing Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164. Similar expressions have been sometimes used by other courts, but upon examination it will be found that in none of them was it ever decided that, although the parties mutually agreed per verba de præsenti to take each other for husband and wife, it was necessary, in order to constitute a valid marriage, that this agreement should have been subsequently acted upon by their living together professedly as husband and wife. In some cases where such expressions were used the court was merely stating a proven or admitted fact in that particular case, while in others the contract of marriage was sought to be proved by habit and repute, and the courts merely meant that the act of parties in holding themselves out as husband and wife is evidence of a marriage.

In State v. Worthingham, supra, which was a prosecution for bastardy, the defendant offered as proof of his marriage to the mother of the child that during all the time they lived and cohabited together the woman held herself out to her friends generally as his wife, and that both of them represented to the world that they had been married. The point really decided by the court, and evidently the only one it had in mind, was that this was competent evidence of a marriage, and that no formal solemnization or ceremony was necessary to give it validity. The statement in the opinion already quoted is probably subject to the criticism that it does not accurately discriminate between the fact of marriage and the proof of it.

The case of Hutchins v. Kimmell, supra, cited by this court, does contain such expressions as "followed by cohabitation," and "from that time lived together professedly in that relation"; but this language was evidently used simply as a recital of the actual facts in that particular case. There is nothing in the opinion indicating that the court intended to hold that a mutual, present consent to be husband and wife will not constitute a valid marriage unless followed by cohabitation of the parties, and a holding of themselves out as man and wife.

Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345, and Id., 79 Cal. 633, 22 Pac. 26, 131, is not in point, for the reason that section 55 of the Civil Code of that state provides that "consent alone will not constitute marriage; it must be followed by a solemnization or by a mutual assumption of marital rights, duties, or obligations."

In view of the increasing number of common-law widows laying claim (in many instances, doubtless, fraudulently) to the estates of deceased men of wealth, it is a question for the legislature whether the common law should not be changed; but with that the courts have nothing to do. * * *

The conclusion at which we have arrived on this question renders it unnecessary to consider other questions discussed by counsel; as, for example, as to the power of the probate court to set aside the probate of a will. In the appeal from the judgment setting aside to the petitioner the homestead of the deceased, and giving her an allowance out of his estate for her maintenance during administration, the judgment is affirmed. In the other appeal the judgment setting aside the probate of the will, and adjudging such will to be of no force or effect, is reversed.[27]

[27] In Sorenson v. Sorenson, 68 Neb. 483, 103 N. W. 455 (1905), where a secret common-law marriage was claimed, it was held that the facts failed to show a marriage, the court saying: "Our marriage laws aim at publicity. To allege that these laws have been disregarded, and that a secret marriage has been entered into, is to cast suspicion upon the conduct of the parties."

Many of the cases discussing common-law marriage are concerned largely with the question of proof of the marriage or with presumptions growing out of matrimonial habit and repute. But whether the marriage is ceremonial or informal, it is held in civil cases generally that neither record proof nor proof by an eyewitness is needed to prove a marriage and that one can be shown by evidence of matrimonial habit and repute. For detailed rules, see Wig. Evidence, § 2082 et seq. See, also, the following cases: Goodman v. Goodman, 28 L. J. Ch. 745 (1859); Collins v. Bishop, 48 L. J. Ch. 31 (1878); In re Shepherd, 73 L. J. Ch. 401 (1904); Senge v. Senge, 106 Ill. App. 140 (1903); Smith v. Fuller (Iowa) 108 N. W. 765 (1906). In Bell v. Clarke, 45 Misc. Rep. 272, 92 N. Y. Supp. 163 (1904), it was held that more evidence would be required to establish a marriage to a woman of dissolute character than in the case of a woman of chaste character. In in Re Maher's Estate, 183 Ill. 61, 56 N. E. 124 (1899), it was held that the presumption of a common-law marriage, arising from the fact of cohabitation and repute, may be overcome by subsequent conduct of the parties indicating that their relations were meretricious. That the evidence of matrimonial reputation must be general, see Ashford v. Metropolitan Life Ins. Co., 80 Mo. App. 638 (1899); Eldred v. Eldred, 97 Va. 606, 34 S. E. 477 (1899); Williams v. Herrick, 21 R. I. 401, 43 Atl. 1036, 79 Am. St. Rep. 809 (1899). But "reputation" to establish marriage is not a word denoting extent of territory. The opinion of a few immediate neighbors, who make up the social circle, outweigh the negative testimony of a thousand citizens who know nothing about the matter. In re Comly's Estate, 19 Pa. Co. Ct. Rep. 184 (1897).

It has been held in some cases that a conviction of bigamy cannot be sustained by showing a first marriage merely by habit and repute. But the weight of authority is against this distinction, either by decision or statute. See Wig. Evid. § 2085, and a note criticising the distinction in 20 Harv. Law Rev. 576. For a recent case contrary to the distinction, see State v. Thompson, 76 N. J. Law, 197, 68 Atl. 1068 (1908).

BEVERLIN v. BEVERLIN.

(Supreme Court of Appeals of West Virginia, 1887. 29 W. Va. 732, 3 S. E. 36.)

SNYDER, J.[28] Suit in equity, instituted November 20, 1884, by Elizabeth Beverlin against Israel A. Beverlin, in the circuit court of Taylor county, for a divorce a mensa et thoro, and for alimony. * * *

The circuit court in its final decree, entered April 1, 1886, decided in favor of the plaintiff, awarding her a divorce a mensa et thoro from the defendant, and requiring him to pay to her $250 annually for her support. From this decree the defendant has appealed.

The first question to be considered is whether or not any marriage ever took place or existed between the plaintiff and defendant. If there was no marriage, or none is shown by proofs, then, as a matter of course, the decree of the circuit court must be reversed, and the plaintiff's bill dismissed. * * *

There is much controversy as to what constitutes a valid common-law marriage. It always has been and still is a doubtful question in England. Reg. v. Millis, 10 Clark & F. 534; 1 Bish. Mar. & Div. §§ 270, 278. In the American states where such marriages have been recognized and held valid there is considerable diversity as to their requisites. In North Carolina, Tennessee, Massachusetts, Maine, and Maryland some ceremony or celebration seems to be necessary to a valid common-law marriage, and in most or all of these states it has been questioned whether or not the statutes have not superseded common-law marriages, and that a marriage, to be valid, must be in conformity with the statutes. State v. Samuel, 19 N. C. 177; Grisham v. State, 2 Yerg. 589; Com. v. Munson, 127 Mass. 459, 34 Am. Rep. 411; State v. Hodgskins, 19 Me. 155, 36 Am. Dec. 742; Denison v. Denison, 35 Md. 361, 379.

The rule is fully as liberal, if not more so, in New York and Pennsylvania, than it is in any of the other states. In New York it has been held that no religious form or ceremony of any kind is essential to validity of the marriage. All that is requisite in that state is that the parties should be capable of contracting, and that they should actually contract to be man and wife; but such contract must be proved to the satisfaction of the court, and may be proved by the wife, when her testimony is corroborated and entitled to credit. Bissell v. Bissell, 55 Barb. 325; Van Tuyl v. Van Tuyl, 57 Barb. 235.

In Pennsylvania it has been decided that "marriage is, in law, a civil contract, not requiring any particular form of solemnization before officers of church or state, but must be evidenced by words in the present tense, uttered for the purpose of establishing the re-

[28] Part of the opinion is omitted.

lation of husband and wife, and should be proved by the signature of the parties, or by witnesses present when it is made. Therefore, when the evidence of the contract was the declaration of the wife that, 'about 31 years since, she went to the house of A. S., to live with and keep house for him, under a mutual promise and agreement that they would sustain towards each other the relation of husband and wife, and that they did thus live and cohabit together,' it was held that there was not proof of a marriage in fact." Com. v. Stump, 53 Pa. 132, 91 Am. Dec. 198.

I have been unable to find any case in which the courts of Virginia or of this state have ever held that a common-law marriage was valid. This is certainly persuasive evidence that such marriages have never been regarded as valid in these states.

Referring to the facts in this case, it does not seem to me that they are sufficient to prove a marriage according to the liberal rule adopted in the states of New York and Pennsylvania. Before any pretense of a legal marriage, the parties had lived and cohabited together for over 12 years. It is a well-settled rule of law everywhere that a cohabitation, illicit in its origin, is presumed to be of that character unless the contrary be proved, and cannot be transformed into matrimony by evidence which falls short of the fact of an actual contract of marriage. Such contract may be proved by circumstances, but they must be such as to exclude the inference or presumption that the former relation continued, and must satisfactorily prove that it had been changed into that of actual matrimony by mutual consent. Foster v. Hawley, 8 Hun, 68; Williams v. Williams, 46 Wis. 464, 32 Am. Rep. 722, and 1 N. W. 98; Appeal of Reading F. Ins. & Trust Co., 113 Pa. 204, 6 Atl. 60, 57 Am. Rep. 448; Hantz v. Sealy, 6 Bin. (Pa.) 405.

In the case before us the testimony of the pretended wife is contradictory, and so unsatisfactory as to render it extremely improbable and unreliable. But, if we admit its credibility, it falls far short of establishing any actual contract of marriage. It simply proves the continuance of the illicit association and cohabitation which is shown to have existed between the parties, without interruption, for over 12 years before the alleged marriage. The plaintiff simply says that she and the defendant did not deem it necessary to marry again, as they considered their former illegal marriage legal, and that they thereafter lived together just as they had been doing, as man and wife. There is no semblance of a change in their relations or actual agreement of marriage shown here, and this is all the evidence we have of the alleged marriage.

But, in the view this court takes of the law, it is unnecessary to rest our decision upon the conclusion just indicated. We think our statute has wholly superseded the common law, and in effect, if not in express terms, renders invalid all attempted marriages contracted in this state which have not been solemnized in compliance with its pro-

visions. The statute in force in this state in 1873, when it is alleged the marriage now in question occurred, is embraced in chapter 63, Code 1868. The first section of said chapter provides for the issuance of marriage licenses; the third, fourth, and fifth sections, by whom, and the manner in which, marriages may be solemnized; and the sixth section is as follows: "Every marriage in this state shall be under a license, and solemnized in the manner herein provided; but no marriage solemnized by any person professing to be authorized to solemnize the same shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected, on account of any want of authority in such person, if the marriage be in all other respects lawful, and be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage; nor shall any marriage celebrated within this state between the seventeenth day of April, 1861, and the first day of January, 1866, be void by reason of the same having been solemnized without such license."

Statutes regulating marriages have generally and properly been construed as directory, and not mandatory. Since marriage is a natural right, and one that existed independent of statutes, any commands which a statute may give concerning its solemnization should, if the form of words will permit, be interpreted as mere directions to the officers of the law and to the parties, not rendering void what is done in disregard thereof. Consequently, the doctrine has become established, as a general rule, that a marriage good at common law will be held valid, notwithstanding the existence of any statute on the subject, unless the statute contains express words of nullity. This rule, however is not universal. 1 Bish. Mar. & Div. § 283. It seems to me, therefore, that when the terms of the statute are such that they cannot be made effective, to the extent of giving each and all of them some reasonable operation, without interpreting the statute as mandatory, then such interpretation should be given to it. The statute under consideration, in express words, declares that "every marriage in this state *shall* be under a license, and be solemnized in the manner herein provided." It is possible that these words, standing alone, should, under the general rule just stated, be interpreted as merely directory. But the statute does not stop here. It qualifies these words by provisions which would be wholly useless and unnecessary if it were intended and should be held that the preceding provisions are simply directory. It is declared that certain marriages shall not *"be deemed or adjudged void"* because the person solemnizing them did not in fact have authority to do so. It also declares that certain other marriages shall not *"be void"* because they were solemnized without a license.

These exceptions or qualifying provisions seem to me to be equivalent to an express declaration that marriages had in this state, con-

trary to the commands of the statute, and not saved by the exceptions, shall be treated as void. It is apparent that the legislature must have interpreted the statute as making the excepted marriages null and void without the excepting clauses, for otherwise the exceptions would be useless, and would not have been made. The introduction of the exemptions is necessary, exclusive of all other independent, extrinsic exceptions. The maxim is clear, "expressum facit cessare tacitum," —affirmative specification excludes implication. Potter's Dwar. St. 221; Cates v. Knight, 3 Term R. 442.

It is therefore my conclusion that no marriage, or attempted marriage, if it took place in this state, can be held valid here, unless it has been shown to have been solemnized according to our statutes. It is very certain, it seems to me, that no attempted or pretended marriage can be held valid when it affirmatively appears that it has not been so solemnized. There is no pretense that the pretended marriage sought to be established in this case was solemnized in any respect according to the requirement of the statute. I am therefore of the opinion that the plaintiff and defendant in this case never were legally married, and that the plaintiff is not entitled to the relief prayed in her bill. I have come to this conclusion with less regret because, by the express command of our statute, "the issue of marriage deemed null in law, or dissolved by a court, shall nevertheless be legitimate." Section 7, c. 78, Code, p. 485; Stones v. Keeling, 5 Call (Va.) 143; Rice v. Efford, 3 Hen. & M. (Va.) 228.

For the reasons stated, the decree of the circuit court must be reversed, and the plaintiff's bill dismissed.

JOHNSON, GREEN, and WOODS, JJ., concurred.[29]

[29] For other cases holding that statutes prescribing formalities are mandatory, see Milford v. Worcester, 7 Mass. 48 (1810); Commonwealth v. Munson, 127 Mass. 459, 34 Am. Rep. 411 (1879); Bashaw v. State, 1 Yerg. (Tenn.) 177 (1829), and cf. Johnson v. Johnson, 1 Cold. (Tenn.) 626 (1860); Smith v. North Memphis Sav. Bank, 115 Tenn. 12, 89 S. W. 392 (1905); Robinson v. Redd's Adm'r (Ky.) 43 S. W. 435 (1897); Norman v. Norman, 121 Cal. 620, 54 Pac. 143, 42 L. R. A. 343, 66 Am. St. Rep. 74 (1898); In re McLaughlin's Estate, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699 (1892); Offield v. Davis, 100 Va. 250, 40 S. E. 910 (1902); Johnson's Heirs v. Raphael, 117 La. 967, 42 South. 470 (1906).

In Offield v. Davis, supra, Cardwell, J., said: "That no case has ever come to this court, before the one we have under consideration, involving the question whether or not a common-law marriage is valid in this state, is strongly persuasive that our people, from the passage of our earliest statutes on the subject of marriage, have interpreted them as mandatory and as wholly superseding the common law on the subject. The conclusions reached in the decided cases and by law writers that statutes regulating marriages are to be construed as directory, only, proceed upon the idea that marriage is of divine origin, and not purely of statutory origin; that marriage is dependent upon mutual consent, not upon the celebration or form by which it is entered into; that it is anterior to all forms, and was already in existence when man first began to make laws, so that the primary intent of all these acts is to regulate marriages, not to confer the privilege, etc. None of these authorities, however, question the power of the legislature, by plain language or clear implication, to declare all marriages or pretended marriages

III. Annulment and Avoidance of Marriage

N. Y. CONSOL. LAWS 1909, c. 14: "Sec. 7. Voidable Marriages—A marriage is void from the time its nullity is declared [30] by a court of competent jurisdiction, if either party thereto:

"1. Is under age of legal consent, which is 18 years;

"2. Is incapable of consenting to a marriage for want of understanding;

"3. Is incapable of entering into the married state from physical cause;

"4. Consents to such marriage by reason of force, duress or fraud;

"5. Has a husband or wife by a former marriage living, and such former husband or wife has absented himself or herself for five successive years then last past without being known to such party to be living during that time."

(A) Grounds for Annulment Based on Lack of Capacity [31]

(a) Nonage

BEGGS v. STATE.

(Supreme Court of Alabama, 1876. 55 Ala. 108.)

Brickell, C. J.[32] * * * 3. The indispensable evidence to support a prosecution for bigamy is that the defendant had "a former wife or husband living"; a subsisting, valid prior marriage, subjecting to its duties, and conferring its rights. If the first marriage

not entered into in accordance with the requirements of the statute illegal and void."

See, also, section 1 of the proposed Uniform Marriage Law (reprinted at end of this chapter); Ill. Rev. St. (Hurd's) 1909, c. 89, § 4, and N. Y. Consol. Laws 1909, c. 14, §§ 11 and 25, expressly abolishing common-law marriages. And see article on "A Proposed Uniform Marriage Law" in 24 Harv. Law Rev. 548, by Ernst Freund.

[30] In several states, as in the above statute, the marriage is said to be "*void from the time its nullity is declared.*" See comment on this form of statute in 1 Bish. Mar., Div. and Sep. §§ 633–640.

[31] See an article entitled "The Law of Capacity in International Marriages," by J. H. Beale, Jr., in 15 Harv. Law Rev. 382, discussing capacity to marry primarily from the standpoint of conflict of laws.

[32] Only part of the opinion is given. The statement of facts is omitted. It is sufficient to know that defendant was indicted for bigamy. He asked the court in writing to charge:

"2. That if they believe, from the evidence, that the defendant was under seventeen years of age at the time of the first marriage, then they must find him not guilty."

The court refused and defendant excepted.

is void, the offense has not been committed. 3 Whart. Am. Cr. Law, § 2628; 3 Greenl. Ev. § 208. But, if it is merely voidable, contracted under disabilities or impediments, which render it capable of confirmation or avoidance as the party may elect, it is a marriage in fact, until avoided, and a second marriage while it remains a marriage in fact is criminal. 3 Whart. Am. Cr. Law, § 2628; 1 East, 466, § 2. By the common law, no persons were capable of binding themselves in marriage, until they had arrived at the age of consent, which in males was fixed at fourteen, and in females at twelve. Marriage before that age was voidable at the election of either party, on arriving at the age of consent, if either of the parties was under that age when the contract was made. 2 Kent, 43; Schouler's Dom. Rel. 32; 1 Bish. Mar. & Div. §§ 149, 150. The statute of this state is: "A male under the age of seventeen, and a female under the age of fourteen years, are incapable of contracting marriage." R. C. § 2333. The evidence tended to show that the defendant was under the age of seventeen when the first marriage was contracted. The charge requested was, that if the first marriage was contracted while the defendant was under seventeen, he was not guilty. The charge assumes, as matter of law, that the first marriage was void. It was refused by the Circuit Court; and whether the first marriage was void, or voidable, is the precise question we must determine.

The statute to which we have referred, fixing the age of consent requisite to a valid marriage, or a marriage binding on the parties, is part of a title of the Code devoted to "Domestic Relations," and of an article devoted especially to "Marriage." The first, second and fourth sections of the article are confined to incestuous marriages, which are in express terms prohibited. The third is the section fixing the age of consent, and is without words of prohibition. It is simply definitive of capacity to contract marriage. The fifth, sixth, seventh, eighth, ninth, tenth, and eleventh sections, relate to the solemnization of marriage, the mode of obtaining authority for, and the preservation of legal evidence of it. The twelfth, thirteenth, fourteenth and fifteenth impose penalties for a violation of the preceding sections, by those having authority to solemnize; and on the probate judge for issuing license to solemnize, or not keeping the proper record of license and solemnization, in violation of the duty imposed on him. There is no penalty imposed on persons not of the requisite age, for contracting marriage, or on any person for contracting marriage, in any other than the mode prescribed. A marriage without license from the probate judge, without solemnization by any person authorized by the statute to solemnize it—a marriage merely by the consent of the parties—followed by cohabitation, is valid. The parties stand to each other in the relation of husband and wife, having all the rights, and subject to all the duties, flowing from a marriage in strict conformity to the statute. Campbell v. Gullatt, 43 Ala. 57.

When the different parts of this article are compared, the intention of the legislature seems unmistakable. Incestuous marriages are prohibited—are void ab initio; no subsequent acts of the parties can affirm, or impart to them validity. Not only are they prohibited, but those entering into them incur severe penalties. R. C. § 3601. There is no prohibition of the union of parties not of the requisite age, and no penalty imposed on them for forming the union. The incestuous marriage contravenes the voice of nature, degrades the family, offends decency and morals, and is absolutely interdicted. A marriage within the age of consent may be indiscreet, may disturb the peace of families, and may subject youth and inexperience to the arts of the cunning and unscrupulous; but it is wanting in the vicious and corrupting properties of the incestuous connection. The change in the terms of the statute in reference to these marriages, and the very nature of the two, forbid an interpretation that would place them in the same condition. If it had been intended to declare void the marriage of a person not of the requisite age, the intention would have been expressed in terms equivalent to those employed when incestuous marriages are prohibited. Goodwin v. Thompson, 2 G. Greene (Iowa) 329; Koonce v. Wallace, 52 N. C. 194. The statute serves the purpose of its enactment, when construed as operating merely an enlargement of the age of consent, from that fixed by the common law—of twelve in females, and fourteen in males—to fourteen in females and seventeen in males. The marriage between persons not of the statutory age is, as was the marriage between persons not of the age of consent at common law, imperfect, becoming perfect only by affirmance when the requisite age is obtained. Until disaffirmance, it is a marriage in fact, and the second marriage of either party is bigamy.

The case of Shafher v. State, 20 Ohio, 1, is opposed to this view, and opposed, as we think, to the great weight of authority. The general rule prevailing in this country is, that marriages, valid at common law, although not in conformity to statutory regulations, are valid, unless the statutes are prohibitory, or in restraint of them. Campbell v. Gullatt, 43 Ala. 57; 2 Green. Ev. § 460; Parton v. Hervey, 1 Gray (Mass.) 119. It would be violative of this principle, and of the intent of the legislature, to construe the statute under consideration as absolutely avoiding the marriage of a person not of the requisite age. We may remark, that if, on arriving at the age of seventeen, the female being of the age of fourteen years—or, if she was not then of the age of fourteen years, when she reached that age—either party disaffirmed the first marriage, it was thereby avoided, and the second marriage, if subsequent to such disaffirmance, was not in violation of law. No question was raised in the court below as to the affirmance or disaffirmance of the first marriage, and it would not be proper to say more in reference to it.

The charge requested did not assert a correct principle, and was

properly refused. For the error we have pointed out, let the judgment be reversed, and the cause remanded. The defendant must remain in custody, until discharged by due course of law.[33]

WOOD v. BAKER.

(Supreme Court of New York, 1904. 43 Misc. Rep. 310, 88 N. Y. Supp. 854.)

Action to annul a marriage. Application for judgment on default.

SPENCER, J. This action is brought by the father of an infant wife against the husband to annul a marriage.

The complaint alleges that the plaintiff is the father of Lizzie E. Baker; that she is an infant; was married to the defendant September 16, 1898, when she was but thirteen years and seven months old; that she has not, since she attained the age of sixteen years, lived or cohabited with the defendant; and prays judgment declaring the marriage void.

The wife is not a party to the action, and there is nothing in the summons or complaint suggestive that the action is brought in behalf of the wife, or instituted with her knowledge or consent.

On the hearing, the court expressed doubt as to whether a valid decree could be entered, and suggested that the plaintiff take an order amending the summons and complaint by bringing the wife in as a party defendant; but plaintiff has not acted upon the suggestion, and insists upon his right to judgment without amendment.

The question, therefore, arises, whether a father may maintain an action to have the marriage of his infant daughter annulled without making such daughter a party to the suit. The plaintiff's attor-

[33] Accord: Walls v. State, 32 Ark. 565 (1877); State v. Cone, 86 Wis. 498, 57 N. W. 50 (1893). In the following civil cases it was also held that, where one party was under the age of consent, the marriage was not void, but merely voidable: Koonce v. Wallace, 52 N. C. 194 (1859); Eliot v. Eliot, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568 (1890); Silveira v. Silveira, 34 Misc. Rep. 267, 69 N. Y. Supp. 634 (1901); Willits v. Willits, 76 Neb. 228, 107 N. W. 379, 5 L. R. A. (N. S.) 767, 14 Ann. Cas. 883 (1906).

But see Hardy v. State, 37 Tex. Cr. R. 55, 38 S. W. 615 (1897), where it was held that, under a statute providing that males under 16 and females under 14 years shall not marry, there can be no common-law marriage with a girl of 10; the court also saying there could be no marriage under that age with a license.

In Fisher v. Bernard, 65 Vt. 663, 27 Atl. 316 (1893), it was held that a provision establishing the age of consent to unlawful carnal knowledge did not affect the age at which a female may consent to marriage.

Where either party is under the age of 7, the marriage is a mere nullity at common law. 1 Bl. Com. 436; Swinburne, Spousals, 20, 21; 2 Burn. Ecc. Law, 434, a.

An infant's promise to marry should be distinguished from his actual marriage. His promise to marry is voidable, whether he is under or over the age of matrimonial consent. Holt v. Ward, 2 Strange, 937 (Trin. Term, 5 & 6 Geo. II); Cannon v. Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709 (1817); Hamilton v. Lomax, 26 Barb. (N. Y.) 615 (1858); 1 Bish. Mar., Div. and Sep. §§ 563-566.

ney, in support of his contention, cites the case of Becker v. Becker, 58 App. Div. 374, 69 N. Y. Supp. 75. This was an action brought by a father to annul the marriage of his minor son while under the age of legal consent, and, so far as the record discloses, the son was not a party, but the opinion contains no allusion to that subject.

I am also referred to the case of Stivers v. Wise, 18 App. Div. 316, 46 N. Y. Supp. 9, which was an action brought by a mother to procure the annulment of a marriage contracted by her son when under the age of legal consent. In the title, the plaintiff is described as the mother of the infant, but the infant is not otherwise mentioned as a party. The sole question before the court in that case had reference to alimony and furnishes no guide for our action here.

Plaintiff also cites Slocum v. Slocum, 37 Misc. Rep. 143, 74 N. Y. Supp. 447. This was an action by a mother to have the marriage of her infant son annulled, on the ground that he had not attained the age of legal consent. It appears from the opinion of the learned justice that the son was not made a party to the action, but the question was not considered. The defendant set up a counterclaim, alleging misconduct on the part of the son committed subsequent to the marriage in respect to his marital obligations. To this the plaintiff demurred, and the court very properly held that the counterclaim constituted no defense to the mother's right of action. I cannot, however, subscribe to the view there incidently expressed, that the mother's right of action may not be rendered nugatory by the election of the son to affirm the marriage.

The marriage contracts of infants are not dependent upon the consent of their parents to the marriage, and parents may not have them annulled upon the ground of their non-consent. It is only the infant wife who may maintain an action to annul her marriage on the ground that it took place without the consent of her father, mother, guardian or other person having legal charge of her person. Code Civ. Proc. § 1742. Neither an infant husband nor a parent or guardian may maintain such an action, and the reasons therefor are not difficult to discover.

The right of a parent to maintain an action for the annulment of the marriage of his infant son or daughter rests solely upon the authority conferred by sections 1744 and 1750 of the Code of Civil Procedure, and the grounds therefor are limited to the fact that one of the parties to the marriage had not attained the age of legal consent, or that the consent of one of the parties was obtained by force, duress or fraud. But has the parent a right to maintain such an action irrespective of the infant and without making such infant a party to the action? I think not. The parent's right to maintain such an action is clearly in behalf of the infant and is in no way dependent upon any right which a parent may possess to control or restrain the marriage. The marriage contracts of infants are not void, but only

voidable at the election of one of the parties to the marriage. A parent or guardian is not such a party.

But the question here has been, I think, practically decided by the Appellate Division of the Fourth Department in the case of Fero v. Fero, 62 App. Div. 470, 70 N. Y. Supp. 472. That was an action by the plaintiff, under the provisions of section 1750, Code of Civil Procedure, to have a marriage between her infant son and the defendant annulled on the ground that the son's consent thereto was obtained by force, duress and fraud. The son was not made a party to the action, and the court decided, in a well-considered opinion, that his presence was necessary for a proper determination of the action.

If such be the rule under the provisions of that section, I can see no reason why it should not prevail in respect to an action such as this, brought by a parent under the provisions of section 1744. The court in the case last cited say: "All persons having an interest in the subject of the action should be joined as plaintiffs or defendants. The complaint alleges that Glen D. Fero consents to the bringing of the action, and he certainly is united in interest with either the plaintiff or the defendant. If he desires to have the marriage annulled, he is interested in obtaining the judgment demanded; but if, on the other hand, he is satisfied with his marital relations, his interest is adverse to that of the plaintiff. In either case the controversy ought not to be determined until he is brought into the action. The rule contended for by the plaintiff's counsel would permit a parent, guardian or 'any relative' of a party to invalidate a marriage without the consent or knowledge of either of the parties thereto, and, if it were to obtain, might prove subversive to social order, sound policy and good morals." I fully concur in the view thus forcibly expressed.

I conclude, therefore, that the plaintiff is not entitled to judgment for the relief demanded in the complaint, and deny his application therefor. Judgment accordingly.[34]

[34] Accord: State ex rel. Scott v. Lowell, 78 Minn. 166, 80 N. W. 877, 46 L. R. A. 440, 79 Am. St. Rep. 358 (1899).

On the right of the infant himself to disaffirm, see People v. Slack, 15 Mich. 193 (1867); Walls v. State, 32 Ark. 565 (1877); People v. Schoonmaker, 119 Mich. 242, 77 N. W. 934 (1899).

In Eliot v. Eliot, 81 Wis. 295, 51 N. W. 81, 15 L. R. A. 259 (1892), it was held that an infant is not estopped to annul the marriage by reason of fraudulent representations as to age.

(b) INSANITY

TRUE v. RANNEY.

(Superior Court of Judicature of New Hampshire, 1850. 21 N. H. 52, 53 Am. Dec. 164.)

Petition for a decree of nullity of marriage, prosecuted by the next friend of the petitioner.

It appeared, from the evidence, that the petitioner resided in Plainfield, in this county, with her parents, was over twenty-one years of age, and had a small property in her own right. She met Ranney secretly one evening, and they went together into the state of Vermont, where the marriage was solemnized. She afterwards returned to her father's house, and this proceeding was thereupon instituted.

It also appeared, from the evidence, that she could not wash nor dress herself properly and decently; that she went to the district school until she was about twenty years old, but could not spell, and could hardly read at all, and could not add nor subtract figures, nor state the number of Sabbaths in the year, nor tell the time of day by a watch, and could be taught nothing of geography. She could not distinguish one piece of money from another, and had no idea of the value of property. She thought one of her father's cows was worth $200 or $300, and one of his horses was worth $300 or $400. She could not knit, nor sew nor take care of her clothes. She could not be taught to do household work of any kind, nor cooking. She said at one time that it would require five hours, and at another time, twelve hours, to get a boiled dinner, and that if she dined at twelve o'clock she must begin to get dinner at twelve. She could not set the table for dinner, but would put the breakfast cups and saucers upon the table. She could not distinguish colors, nor cotton from flannel, nor count beyond twenty, nor be trusted to go on errands. She played with children four or five years old, and with their toys. She asked whether apples did not grow upon elm trees. At school she spoke of matters to the master, which females of her age would not allude to.

GILCHRIST, C. J.[35] Allusion is made to a decree of "divorce or nullity" by this court in the Revised Statutes, c. 148, §§ 2, 12, and 13. No mode is prescribed either in the constitution, or the statutes, in which proceedings shall be instituted and carried on, for the purpose of procuring a decree of nullity of marriage; but that the court have the power to make such a decree, and to regulate the mode of procedure, we think is beyond doubt. 2 Kent, Comm. 76. There is a provision in section 7, ch. 148, that every libel shall be signed by

[35] Part of the case on a point of conflict of laws is omitted.

the libellant, if of sound mind, and of the age of legal consent, otherwise by the parent, guardian, or next friend of such libellant.

The consent of the parties is essential to the validity of all contracts; and as marriage is a contract, it is essential to its validity, that the parties should understand the nature of the agreement they are about to enter into. Londonderry v. Chester, 2 N. H. 278, 9 Am. Dec. 61; Clark v. Clark, 10 N. H. 382, 34 Am. Dec. 165; 1 Bl. Com. 433. In the case of Turner v. Meyers, 1 Hagg. Cons. R. 416, 417, Lord Stowell said, a defect of capacity invalidates the contract of marriage, as well as any other contract. It is true, that there are some obscure dicta by the earlier commentators on the law, that the marriage of an insane person could not be invalidated on that account; founded on some notion that prevailed in the Dark Ages, of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character.[36] In more modern times it has been considered in its proper light, as a civil contract, as well as a religious vow; and like all civil contracts will be invalidated by want of consent of capable persons. So in the case of Browning v. Reame, 2 Phill. R. 70, Sir J. Nicholl, after quoting Blackstone, said: "Here then the law, and the good sense of the law, are clearly laid down; want of reason must, of course invalidate a contract, and the most important contract of life, the very essence of which is consent. If the incapacity be such that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, of taking care of his or her own person, or property, such an individual cannot dispose of her person and property by the matrimonial contract, any more than by another contract." A marriage de facto, under circumstances of privacy, inferring fraud and circumvention, between a person of weak and deranged mind, and the daughter of his trustee, and solicitor, who had great influence over him, and by whom he was clearly considered and treated as of unsound mind, was pronounced null and void. Portsmouth v. Portsmouth, 1 Hagg. 355.

The evidence in the case satisfies us, as we think it cannot fail to satisfy any reasonable man, that the petitioner was so imbecile, that she was entirely unable to understand the nature and obligation of the contract into which it was proposed she should enter. There is every reason to believe, that no person so lamentably imbecile as this young woman appears to be, could have the remotest idea of the meaning of a contract, for the performance of any of the ordinary

[36] Even some American judges seem to have been of the opinion that the marriage of an insane person was valid at common law. See Park v. Barron, 20 Ga. 702, 65 Am. Dec. 641 (1856), where McDonald, J., said: "Marriage contracts are, by the common law, excepted from the rules which govern ordinary contracts. By the common law, an idiot might contract marriage, and the marriage of an idiot or lunatic was considered valid." And see Hamaker v. Hamaker, 18 Ill. 137, 65 Am. Dec. 705 (1856).

duties of life, and still less of a contract of marriage. * * * We are, therefore, of opinion, that there should be a decree of nullity of marriage.[37]

LEWIS v. LEWIS.

(Supreme Court of Minnesota, 1890. 44 Minn. 124, 46 N. W. 323, 9 L. R. A. 305, 20 Am. St. Rep. 559.)

Appeal from district court, Hennepin county.

VANDERBURGH, J. The statute in relation to divorces (Gen. St. c. 62, § 2) provides that "when either of the parties * * * for want of age or understanding is incapable of assenting thereto, * * * the marriage shall be void from the time its nullity is declared by a court of competent authority." Certain limitations are imposed by sections 4 and 5, as follows: "Nor shall the marriage of any insane person be adjudged void after his restoration to reason, if it appears that the parties freely cohabited together as husband and wife after such insane person was restored to a sound mind. Sec. 5. No marriage shall be adjudged a nullity at the suit of the party capable of contracting, on the ground that the other party was * * * insane, if such * * * insanity was known to the party capable of contracting at the time of such marriage." There are no other provisions on the subject of insanity, and no form of insanity or in-

[37] On the test of insanity for the purpose of annulling a marriage, see 1 Bish. Mar., Sep. & Div. §§ 591–601, and the following cases: Turner v. Meyers, 1 Hagg. Cons. 414 (1808); Foster v. Means, 1 Speers' Eq. (S. C.) 569, 42 Am. Dec. 332 (1844); Ward v. Dulaney, 23 Miss. 410 (1852); Durham v. Durham, 10 Prob. Div. 80 (1885); Pyott v. Pyott, 191 Ill. 280, 61 N. E. 88 (1901).

The cases on insanity frequently use the terms "void" and "voidable" very loosely. See 1 Bish. Mar., Div. and Sep. §§ 614–632. And see the following cases: Inhabitants of Middleborough v. Inhabitants of Rochester, 12 Mass. 363 (1815), holding that marriage does not change the settlement of an insane person, and saying that marriage of an insane person is valid for no purpose whatever; Sims v. Sims, 121 N. C. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. Rep. 665 (1897), where suit was for divorce and court said marriage of an insane person could not be ratified by cohabitation after restoration to sanity; Chapline v. Stone, 77 Mo. App. 523 (1898), where marriage was annulled after nineteen years' continuous insanity, court holding plaintiff was not estopped by delay; Inhabitants of Winslow v. Inhabitants of Troy, 97 Me. 130, 53 Atl. 1008 (1902), where court said marriage of insane person is void ab initio and can be impeached collaterally without judgment of nullity.

Compare the following: Gross v. Gross, 96 Mo. App. 486, 70 S. W. 393 (1902), where in a suit for nullity it was held that the marriage was ratified by living together during lucid intervals; Price v. Price, 142 Ala. 631, 38 South. 802 (1905), where it was held that plaintiff was estopped to annul the marriage for insanity after delaying thirty-three years with notice of the insanity; Ducasse's Heirs v. Ducasse, 120 La. 731, 45 South. 565 (1908), holding that right to annul for insanity does not pass to heirs under Civ. Code, art. 110. See note in 40 L. R. A. 737–746, collecting cases.

On the influence of intoxication at the time of marriage, see 1 Bish. Mar., Div. and Sep. §§ 607–609, and Barber v. People, 203 Ill. 543, 68 N. E. 93 (1903).

sane delusion is included in the list of causes for divorce; and insanity arising subsequent to the marriage affords no ground for divorce.

The section first quoted is simply declaratory of the common law. There must have been, at the time of the marriage, such want of understanding as to render the party incapable of assenting to the contract of marriage. The plaintiff applies for a decree of nullity on the ground of his wife's insanity at the time of his marriage, of which he claims to have then had no knowledge. The particular form of insanity alleged was a morbid propensity on the part of the wife to steal, commonly denominated "kleptomania." It was not proved, nor is it found by the court, that she was not otherwise sane, or that her mind was so affected by this peculiar propensity as to be incapable of understanding or assenting to the marriage contract. Whether the subjection of the will to some vice or uncontrollable impulse, appetite, passion, or propensity be attributed to disease, and be considered a species of insanity or not, yet, as long as the understanding and reason remain so far unaffected and unclouded that the afflicted person is cognizant of the nature and obligations of a contract entered into by him or her with another, the case is not one authorizing a decree avoiding the contract. Any other rule would open the door to great abuses. Anon. 4 Pick. (Mass.) 32; St. George v. Biddeford, 76 Me. 593; Durham v. Durham, 10 Prob. Div. 80.

For a discussion upon the characteristics of the peculiar infirmity to which the defendant here is alleged to be subject, see 1 Whart. & S. Med. Jur. (4th Ed.) §§ 591, 595. The cases are numerous in which contracts and wills have been upheld by the courts, though the party executing the same is subject to some peculiar form of insanity, so called, or is laboring under certain insane delusions. In re Blakely's Will, 48 Wis. 294, 4 N. W. Rep. 337; Jenkins v. Morris, 14 Ch. Div. 674; 11 Amer. & Eng. Enc. Law, 111, and cases.

2. The defendant is found to have been subject to this infirmity at the time of her marriage with plaintiff, in 1882, but it was concealed and kept secret from the plaintiff by her and her relatives, and was not discovered by him until 1888. As before suggested, if it had developed after the marriage, the plaintiff would not have been entitled to judicial relief, though the consequences might have been equally serious to him. But the plaintiff contends that such concealment constituted a case of fraud, such that the court should declare the contract of marriage void on that ground. Where one is induced, by deception or stratagem, to marry a person who is under legal disability, physical or mental, the fraud is an additional reason why the unlawful contract should be annulled. And so deception as to the identity of a person, artful practices and devices, used to entrap young, inexperienced, or feeble-minded persons into the marriage contract, especially when employed or resorted to by those occupying confidential relations to them, and where the contract is not

subsequently ratified, are proper cases for the consideration of the court. But, generally speaking, concealment or deception by one of the parties in respect to traits or defects of character, habits, temper, reputation, bodily health, and the like, is not sufficient ground for avoiding a marriage. The parties must take the burden of informing themselves, by acquaintance and satisfactory inquiry, before entering into a contract of the first importance to themselves and to society in general. Reynolds v. Reynolds, 3 Allen (Mass.) 607, 608; Leavitt v. Leavitt, 13 Mich. 456; 1 Cooley, Bl. 439, and notes.

The facts found do not present a case warranting the relief asked. Judgment affirmed.

(c) PHYSICAL DISABILITY

The cases placed under this head are usually cases of fraudulent concealment. See cases later under head of "Fraud," p. 72 et seq. As to the power of a court to direct a surgical examination of defendant in an action to annul a marriage on the ground of physical disability, see Cahn v. Cahn, 21 Misc. Rep. 506, 48 N. Y. Supp. 173 (1897), and note in 11 Harv. Law Rev. 478.

In several states there are statutes prohibiting the marriage of epileptics under certain circumstances. A statute of this kind was held constitutional in Gould v. Gould, 78 Conn. 242, 61 Atl. 604, 2 L. R. A. (N. S.) 531 (1905). The court, however, held the marriage not to be void, but only voidable, in case of fraudulent concealment. See note on the case in 19 Harv. Law Rev. 298. For definition of "physically incapable," under the New York statute, see Schroter v. Schroter, 56 Misc. Rep. 69, 106 N. Y. Supp. 22 (1907). See, also, Wendel v. Wendel, 30 App. Div. 447, 52 N. Y. Supp. 72 (1898), and B. (otherwise H.) v. B., 70 L. J. Prob. 4, [1901] Prob. 39.

In several states statutes declare marriages between whites and negroes, or whites and Indians, to be void. See Moore v. Moore, 98 S. W. 1027, 30 Ky. Law Rep. 383 (1907); Keen v. Keen, 184 Mo. 358, 83 S. W. 526 (1904); Locklayer v. Locklayer, 139 Ala. 354, 35 South. 1008 (1904); In re Walker's Estate, 5 Ariz. 70, 46 Pac. 67 (1896).

(d) RELATIONSHIP

ST. 25 HEN. VIII, c. 22, §§ 3 and 4: "And furthermore, since many inconveniences have fallen, as well within this realm as in others, by reason of marrying within the degrees of marriage prohibited by God's laws, that is to say, the son to marry the mother, or the stepmother, the brother the sister, the father his son's daughter, or his daughter's daughter, or the son to marry the daughter of his father procreate and born by his stepmother, or the son to marry his aunt, being his father's or mother's sister, or to marry his uncle's wife, or the father to marry his son's wife, or the brother to marry his brother's wife, or any man to marry his wife's daughter, or his wife's son's daughter, or his wife's daughter's daughter, or his wife's sister; (2) which marriages, albeit they be plainly prohibited and detested by the laws of God, yet nevertheless at some-

times they have been proceeded under colours of dispensations by man's power, which is but usurped, and of right ought not to be granted, admitted or allowed; for no man of what estate, degree or condition soever he be, hath power to dispense with God's laws, as all the clergy of this realm in the said convocations, and the most part of all the famous universities of christendom, and we also do affirm and think.

"Be it therefore enacted by the authority aforesaid, that no person or persons, subjects or resiants of this realm, or in any your dominions, of what estate, dignity or degree soever they be, shall from henceforth marry within the said degree afore rehearsed, what pretence soever shall be made to the contrary thereof."

ACT OF ILLINOIS, FEBRUARY, 7, 1843 (Laws 1843, p. 155): "Sec. 1. All marriages hereafter contracted between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, and between uncles and nieces, aunts and nephews, are declared to be incestuous and absolutely void. This section shall extend to illegitimate as well as legitimate children and relations."

ACT OF ILLINOIS, JUNE 15, 1887 (Laws 1887, p. 225): Amends section 1 of an act to revise the law in relation to marriages, of February 27, 1874, which re-enacts law of February 7, 1843 (see above), by inserting, after "aunts and nephews," the words, "and between cousins of the first degree."

N. Y. CONSOL. LAWS, c. 14, § 5: "A marriage is incestuous and void whether the relatives are legitimate or illegitimate between either: 1. An ancestor and descendant, or, 2. A brother and sister of either the whole or half blood. 3. An uncle and niece or an aunt and nephew."

BOWERS v. BOWERS.

(Court of Errors of South Carolina, 1858. 10 Rich. Eq. 551, 73 Am. Dec. 99.)

Edward Bowers died in the month of December in the year 1835, intestate. Shortly before his death a marriage ceremony was celebrated, in the town of Camden, between him and Elizabeth Jemima Graham, his niece, a brother's daughter.

In the bill filed in this case, by certain of his children, by a former

marriage, for partition of a considerable estate left by him the ground was taken that this marriage between him and his niece was illegal and void, by reason of their too close relationship, and that the latter was entitled to no part of his estate.

The circuit decree is as follows:

DUNKIN, Ch. Upon hearing the bill, and answers, and the argument of counsel; it is ordered, on motion of J. B. Kershaw, defendants' solicitor, that the report of the Commissioner on the accounts of Anderson Bowers, administrator, the advancements to the children of the intestate, Edward Bowers, and the settlement upon Jemima Turner be confirmed with the recommendations of the Commissioner.

Also ordered, that the administrator do pay out of the corpus of the estate in his hands the costs of this suit, and that he do pay over to the defendant, Elizabeth Jemima Robertson, late Bowers, one-third of the balance of the estate in his hands as administrator.

Also ordered, that the said administrator do pay over to the parties entitled, reserving the share of Jemima Turner, the remaining two-thirds of the balance of the estate in his hands, after payment of costs, first deducting therefrom such reasonable counsel fee as he may have paid his counsel for his services in this case.

It is also ordered, that the Commissioner do proceed to collect the securities in his hands, given for the purchase of the real estate of Edward Bowers, deceased, when they shall have become due, and pay over the same, one-third to said Elizabeth Jemima Robertson, late Bowers, and the remaining two-thirds to the children of the said Edward Bowers, deceased, except the share of Jemima Turner, which he shall retain until the further order of the Court.

The opinion of the Court was delivered by

DUNKIN, Ch. It is not questioned that the circuit decree of the Court of Equity is in conformity with the unanimous judgment of the Law Court of Appeals in State v. Barefoot, 2 Rich. 209. Barefoot was indicted for bigamy, and the conviction was sustained upon the determination of the Court, that the marriage of the defendant, with his aunt, was valid, by the laws of South Carolina. The avowed object of the appeal is to obtain the review and reversal of that judgment.

Marriage in the State of South Carolina has always been regarded as a merely civil contract. For any civil disability it may be treated as void by any judicial tribunal of the State. But the Court of Equity has no more authority over the subject than a Court of Law, and any attempt to exercise any greater or more extensive authority would be a simple act of usurpation. In Mattison v. Mattison, 1 Strob. Eq. 387, 47 Am. Dec. 541, it was determined unanimously by the Court of Errors that in a suit between the parties to the marriage seeking to have the same declared void, the Court of Equity had no jurisdiction. But in a suit between third persons, arising

in the Court of Law, the validity of the same marriage, impeached on account of an alleged civil disability, was fully examined, discussed and determined. The same power is familiarly exercised by the Court of Equity, as is illustrated by the case of Foster v. Means, Speer, Eq. 569, 42 Am. Dec. 332. All these inquiries relate, however, to some civil disability or other infirmity of that character in the alleged contract. But the incapacity in respect of proximity of relationship is a *canonical*, and *not* a *civil* disability. Neither the Court of Chancery in England, nor any of the Law Courts had cognizance of canonical disabilities. When Parliament thought proper to interfere, and, by the Stat. 5 and 6 Will. IV, c. 54, declared that all marriages, thereafter celebrated between persons within the prohibited degrees of consanguinity or affinity, should be absolutely void, then the objection came within the cognizance of the Courts of Common Law. 2 Steph. Com. 284. So when the Legislature of South Carolina shall have prescribed within what degrees of relationship marriages shall be invalid, the law will be understood by the citizen, and enforced by the courts. But by this appeal the Court is invoked to recognize a principle which would not only declare void a marriage between uncle and niece, and of course bastardize their issue, but a marriage between a man and his wife's sister falls within the same category, and, if the canonical mode of computation of the Levitical degrees be adopted, a marriage between first cousins is equally prohibited. See note to 2 Steph. 284. On the other hand, extreme cases of unnatural alliances may be supposed at which the moral sense would be offended, but hitherto public sentiment, if not private morality, has repressed all such evils. It is far better to leave to the Legislature the appropriate duty of defining and prohibiting such evils rather than arm the Court of Chancery with ecclesiastical powers on a subject of great delicacy and pervading interest.

But the proposition of the appellants could not be successfully maintained in any Court of Great Britain, ecclesiastical, or civil. Marriages within the Levitical degrees are not void, but only voidable. And, even in Doctors' Commons, you are not permitted to violate the sanctity of the tomb, and impeach for alleged canonical disability the validity of a nuptial contract which death has already dissolved. "Not only" (says a learned commentator) "are marriages, under these circumstances of disability, esteemed valid, until there be actual sentence of separation, but they are permanently valid, unless such sentence be given during the life of the parties. (For, after the death of either of them, the Courts of Common Law will not suffer the spiritual courts to declare such marriages to have been void.)" 2 Steph. Com. 280. Bury's Case, 5 Rep. 98.

In the temporal Courts such marriages are held valid for all civil purposes unless sentence of nullity be obtained in the lifetime of the parties. Shelf. Mar. and Div. 482. A marriage within the prohibited degrees, not avoided during the lifetime of both parties, confers the

civil rights of marriage, such as the right of dower, right of administration, etc. Shelf. p. 179. And the author refers to Co. Litt. 33b, where it is said "that if a marriage be voidable in respect of consanguinity, affinity, etc., whereby the marriage might have been dissolved, yet if the husband die before any divorce, then for that it cannot now be avoided; this wife, de facto shall be endowed, for this is legitimum matrimonium quoad dotem."

So, in this case, it appeared that Edward Bowers, the husband, was dead, and the circuit decree properly adjudged to his widow, Elizabeth Jemima, one-third of his estate under the statute of distributions.

It is ordered and decreed that the appeal be dismissed. O'Neall, Wardlaw, Glover and Munro, JJ., concurred.

Appeal dismissed.[38]

HAYES v. ROLLINS.

COLBATH v. ROLLINS.

(Supreme Court of New Hampshire, 1894. 68 N. H. 191, 44 Atl. 176.)

Bills in Equity, to determine the rights of the parties in property in which Samuel E. Colbath claimed an interest as the surviving husband of Carrie J. Colbath. Facts found by the court. Samuel E. and Carrie J. were cousins. Both resided in this state at the time of their marriage here in 1889, and thereafter until her decease.

Wallace, J. The statute in force at the time of the marriage in question prohibited the marriage of cousins (G. L. c. 180, §§ 1, 2), and provided that "every marriage contracted by parties within the degrees prohibited by the two preceding sections is incestuous and void, and the issue of such marriage illegitimate." G. L. c. 180, § 3. It also provided that "all marriages prohibited by law on account of the consanguinity or affinity of the parties, * * * if solemnized in this state, shall be absolutely void without any decree of divorce or other legal process." G. L. c. 182, § 1.

[38] See 2 Poll. & Mait. Hist. of Eng. Law, 383–390, for historical discussion and method of computing degrees.

To the effect that relationship within the forbidden degrees renders the marriage voidable merely, and not void, see Harrison v. State, 22 Md. 468, 85 Am. Dec. 658 (1863), and Boylan v. Deinzer, 45 N. J. Eq. 485, 18 Atl. 119 (1889), with note collecting cases. To the effect that, where statute makes the marriage voidable on account of relationship, a court of equity will annul at the instance of either party, though the applicant may have knowingly and willfully entered into the same, see Martin v. Martin, 54 W. Va. 301, 46 S. E. 120, 1 Ann. Cas. 612 (1903). For nature of decree and penance imposed by the ecclesiastical court, see Blackmore and Thorpe v. Brider, 2 Phil. 359, at 362 (1816).

On the impediment of affinity, see 1 Bl. Comm. 435; Hill v. Good, Vaughan, 302; Harris v. Hicks, 2 Salk. 548 (Hil. T. 4 and 5 W. & M.); Aughtie v. Aughtie, 1 Phil. 201 (1810). Cf. Blodget v. Brinsmaid, 9 Vt. 27 (1837).

Under the common law, the canonical impediments of consanguinity and affinity only rendered a marriage voidable. Until set aside, it was practically valid. Some of the American courts, following this doctrine, have construed statutes declaring such marriages void as meaning voidable, when such construction was not expressly precluded by the terms of the statute. 1 Bish. Mar. & Div. §§ 105, 112, 320. But our statute, which expressly provides that marriages within the prohibited degrees shall be absolutely void without any decree of divorce or other legal process, renders this marriage void. It is impossible to put any other construction upon the statute without doing violence to the English language, and defeating the clearly expressed intention of the legislature. Blaisdell v. Bickum, 139 Mass. 250, 1 N. E. 281. The marriage between these parties being absolutely void without any judicial process or decree, Samuel E. can take thereby no interest in the estate of Carrie J.

Case discharged. All concurred.[39]

(e) Prior Subsisting Marriage

CHAMBERLAIN v. CHAMBERLAIN.

(Court of Chancery of New Jersey, 1905. 68 N. J. Eq. 414, 59 Atl. 813.)

Bill by Mary Chamberlain against Stroud H. Chamberlain. Heard on bill, answer, replication, and proofs. Decree advised for complainant.

Stevenson, V. C. (orally).[40] This bill is filed under the twentieth section of our divorce act by Mary Chamberlain against Stroud H. Chamberlain, who she alleges is her husband, charging that he has abandoned her and neglected and refused to support her, and praying for the statutory relief afforded in such a case. The answer contains an attempt, as I recall it, to answer the charges of misconduct set forth in the bill of complaint, but sets up as a complete defense —and this is the only defense which is supported by proof so as to call for consideration—that the defendant is not the husband of the complainant, and therefore is not liable to the statutory action, and is not liable to discharge the common-law duty which a husband owes to the wife in respect of support.

The brief for the defendant, which is very voluminous and discusses a large number of cases, presents at the start the following as the history of the case: "William Tissell and Mary Walsh (Mary Walsh being now the complainant, Mary Chamberlain) were married March

[39] See, also, McIlvain v. Scheibley, 109 Ky. 455, 59 S. W. 498 (1900); Stapleberg v. Stapleberg, 77 Conn. 31, 58 Atl. 233 (1904). But a statute declaring marriages void for relationship will not be construed as retroactive. Weisberg v. Weisberg, 112 App. Div. 231, 98 N. Y. Supp. 260 (1906).

[40] Part of the opinion is omitted.

29, 1871. William Tissell left Mary Tissell and went to St. Louis, and thence to Oak Grove, Texas, March 12 or 15, 1877. About July, 1877, a letter was received by Mary Tissell from William Tissell. Mary Tissell, under the name of Mary Walsh, was married to Stroud H. Chamberlain April 4, 1880. Mary Chamberlain, under the name of Mary Tissell, filed a petition for divorce in this court, sworn to by her, May 8, 1880, and decree of divorce granted thereon June 30, 1881. From time of marriage to Stroud H. Chamberlain in 1880, both lived and cohabited together as man and wife until defendant left her, in March, 1903. There was no issue born of the marriage. Both complainant and defendant believed the first husband, William Tissell, was dead until after these proceedings (that is, the proceedings in this present suit) were instituted, when that he was alive was discovered by the defendant. William Tissell, the first husband, was, at the time of the filing of the bill and the hearing of this case, living at Oak Grove, Texas." * * *

We have, then, the case of a man and woman who undertook to enter into the marriage relation with each other on April 4, 1880, both parties believing in good faith that they were competent to enter into that relation—that each of them had the capacity to marry the other—while in fact one of the parties, the complainant, the woman, was under a disability on account of her having a husband then living. These two parties, entertaining such belief, were married by a clergyman in the city of Brooklyn, and thereupon began living together as man and wife, and continued to cohabit as man and wife, holding themselves out to the world as married, each recognizing the other as his or her lawful spouse, for a period of 23 years. The proofs, I think, indicate that, before the complainant undertook to marry the defendant, she went, with his knowledge, to counsel, and instructed him (the counsel) to institute a divorce suit against her former husband, William Tissell, whom she believed to be dead. Without waiting, however, to obtain the decree which was subsequently obtained, divorcing her from Tissell on the ground of desertion, she undertook to enter into the marriage relation with the defendant. Both parties appear to have had full knowledge of all the facts. * * *

After the decree of divorce had been obtained in June, 1881, the complainant and defendant were living together, and some question was raised among the women who were living in the same boarding house, or living near these parties, in regard to Mrs. Chamberlain's status. The complainant was then known, and had been known and always was known after her marriage in April, 1880, as Mrs. Chamberlain, and was regarded as the defendant's wife. * * *

I shall not deal in detail with this matter, because both of these parties most positively testified that they believed that their original marriage was absolutely valid, and that Tissell was then dead, and that they never believed otherwise until after this present suit was commenced.

When the decree of divorce was obtained in June, 1881, these two parties for the first time became capable of marrying each other. They thought, as they both swear, that they were capable of marriage at the time of the ceremony, April 4, 1880. That is proved to have been a mistaken belief, but when the decree of divorce was obtained in June, 1881, then they became for the first time capable of entering into the marriage relation with each other. They continued, after the complainant's disability had been removed, to live as man and wife until March, 1903, a period of nearly 22 years. During all that time they treated each other as husband and wife. The proof of continuous, unbroken matrimonial habit and repute is beyond doubt or question. * * *

The controverted question in this case is whether, under the circumstances that I have stated, the relation of husband and wife between these parties was created at any time after the disability of the complainant to contract marriage with the defendant had been removed by the decree of divorce in June, 1881. In my opinion, upon the facts stated, the relation of husband and wife between these parties did begin—was created—at the time when the decree of divorce rendered it possible for them to marry. I am also of opinion that, if this first conclusion is erroneous, the relation of husband and wife began to exist a short time after the decree of divorce was obtained, when the defendant assured the complainant that it was not necessary to have any further ceremonial marriage between them; assured her that she was his legal wife; gave her this assurance in the presence of witnesses; and thereupon, in reliance upon such representations and statements of the defendant, the complainant remained with him, cohabiting with him as his wife, from year to year. * * *

There are three principal classes of cases which have come up in the courts where a man and woman have undertaken to establish before the world the status of marriage by a formal ceremony, and have continuously thereafter cohabited and held themselves out to the world as man and wife, when, in fact, at the time of the ceremonial marriage, one of them had a wife or husband already living, but where such incapacity during the course of the cohabitation has been removed by the death of the former wife or husband, or a decree of divorce has been obtained, dissolving such former marriage. One class of these cases is illustrated in Campbell v. Campbell, L. R. 1 H. L. Sc. 182, commonly referred to as the "Breadalbane Case." In that case a man eloped with a married woman, and lived in adultery with her. Subsequently the woman's husband died, and this man and woman continued to cohabit as they had formerly done; holding themselves out to the world, as they began to do at the time when they first lived together in adultery, as husband and wife. The House of Lords found that, under the circumstances of that case, the true rule would establish the marriage between these people who were treating each other as husband and wife at the time when they first became capable

of entering into such relation.[41] The doctrine of this case was rejected by our Court of Errors and Appeals in the case of Collins v. Voorhees, to which I shall next refer, and which belongs to the second class.

The case of Collins v. Voorhees, which I have before me, reported in the Court of Chancery under the name of Voorhees v. Voorhees' Executors, in 46 N. J. Eq. 411, 19 Atl. 172, 19 Am. St. Rep. 404, and in the Court of Errors and Appeals in 47 N. J. Eq. 315, 20 Atl. 676, 14 L. R. A. 364, 24 Am. St. Rep. 412, where the dissenting opinion of Mr. Justice Garrison appears, and on page 555, 47 N. J. Eq., page 1054, 22 Atl., where the opinion of the Court of Errors appears through Chief Justice Beasley, presented these facts: The man, Voorhees, obtained a fraudulent and void divorce in Connecticut from his wife, who resided in New Jersey. He knew that his suit and decree were a gross fraud on his wife, and on the court. He exhibited this decree of divorce to a woman in Massachusetts, and she, honestly believing that he was lawfully divorced, was publicly married to him in a church, and thereafter continuously for some years cohabited with him as his wife, and was held out as his wife, and bore to him two children. As a matter of fact, a few months after this marriage Voorhees' wife in New Jersey heard of the fraudulent divorce which had been obtained in Connecticut, and appeared in the cause and had the decree opened, had permission to file a cross-bill, and the result was that the original decree obtained by Voorhees was vacated as fraudulent, and a decree of absolute divorce was granted to the New Jersey wife. This decree, of course, rendered Voorhees capable of marrying his Massachusetts wife. Voorhees, however, for manifest reasons, did not inform the woman who was living with him as his wife, in innocence, supposing that her marriage was lawful, that the decree of divorce had been set aside. He did not propose to have another marriage ceremony. He concealed fraudulently from the woman with whom he was living the fact that he had been incapable of marrying her when he undertook to do so, and that by the decree of divorce he had been rendered capable

[41] See, also, the following cases, in which the impediment was apparently known to both parties: Stein v. Stein, 66 Ill. App. 526 (1896), held marriage ceremony ratified by living together seven years after the impediment was removed; Robinson v. Ruprecht, 191 Ill. 424, 61 N. E. 631 (1901), continuance of relation with matrimonial intent constitutes marriage, though both were impeded at the beginning, distinguishing Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105 (1887); Bechtel v. Barton, 147 Mich. 318, 110 N. W. 935 (1907), held married by living together twenty years after removal of impediment; Mick v. Mart (N. J. Eq.) 65 Atl. 851 (1907), held married after removal of impediment, where defendant asked plaintiff if she was his wife, and he replied, "Yes, you are before God," and they continued to live together; Adger v. Ackerman, 115 Fed. 124, 52 C. C. A. 568 (1902), held continued cohabitation after removal of impediment raises a presumption of marriage. In Edelstein v. Brown, 35 Tex. Civ. App. 625, 80 S. W. 1027 (1904), it was held that the facts showed no intention to change the character of the relation after removal of the impediment, and hence no marriage.

of such marriage. He went on for years enjoying all the fruits of his marriage or attempted marriage with this Massachusetts woman. In reliance upon his representations that he was her husband, and innocent of any wrongful intent, this woman surrendered herself to him and gave him all the advantages of marriage with her, and, of course, debarred herself from marriage with any other man.

The decision of the Court of Errors and Appeals, affirming the decree below in this case, was that the relations of Voorhees with the Massachusetts woman were not matrimonial at the start, because, of course, they could not be; but the decision goes further, and holds that the relations between Voorhees and this woman, when by the decree of divorce he had been rendered capable of marrying her, continued to be meretricious; that the matrimonial habit and repute after the divorce had been obtained must be referred back to the origin of the relations between these people. The court seem, in the opinion, to treat the case as belonging to the same class as the Breadalbane Case, where the relations between the parties—the man and woman—at the start were known to both to be meretricious.

It has always seemed strange to me that, in the opinions of the learned judges in this court and in the Court of Errors in this Voorhees Case, no reference is made to the law of estoppel—the great doctrine which is so potent in our law for the redress and the prevention of fraud. The case goes altogether upon the actual intent of Voorhees. In the Breadalbane Case the intent of both parties at the time the relations were established between them was to live in adultery, while they covered up their criminal relations by presenting the appearance of man and wife before the world. In the Voorhees Case the intention of this innocent woman was to enter into the lawful state of marriage with Voorhees.[42] He committed a gross fraud on her in obtaining possession of her and causing her to sacrifice her life to him, but she was not to blame. It has always seemed strange to me that

[42] In the following cases, also, only one party knew of the impediment; the other being innocent: Flanagan v. Flanagan, 122 Mich. 386, 81 N. W. 258 (1899). Innocent party, on learning of the impediment and its removal, insisted on a new ceremony. The other party objected on the ground of scandal, etc. Held facts justified a finding that there was an agreement to take each other as husband and wife, which made a valid marriage. See, also, Barker v. Valentine, 125 Mich. 336, 84 N. W. 297, 51 L. R. A. 787, 84 Am. St. Rep. 578 (1900). In Re Schmidt, 42 Misc. Rep. 463, 87 N. Y. Supp. 428 (1904), the innocent wife knew nothing of the impediment until the death of her husband, thirteen years after removal of the impediment. Held a common-law marriage. See, also, In re Wells' Estate, 123 App. Div. 79, 108 N. Y. Supp. 164 (1908), and Geiger v. Ryan, 123 App. Div. 722, 108 N. Y. Supp. 13 (1908).

Cf. Commonwealth v. Stevens, 196 Mass. 280, 82 N. E. 33 (1907), where defendant married in Georgia before his first wife's Massachusetts divorce became absolute. Held, subsequent cohabitation of defendant and second wife after decree became absolute would not cure defect under common law of Massachusetts. See, also, Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105 (1887), distinguished in Robinson v. Ruprecht, 191 Ill. 424, 61 N. E. 631 (1901).

no one suggested that Voorhees was estopped to deny that he consented concurrently with this woman to enter into the marriage state, when he had in the most solemn manner represented to her that he in fact did enter into that state with her, and, in reliance upon that representation, she had acted so much to her injury, and that, in accordance with the familiar rule, such estoppel became operative when he became capable of doing what he had falsely pretended to do.

I know of no reason why the doctrine of estoppel in pais should not be applied in dealing with the consent which is necessary—the concurrent consent of a man and woman capable of contracting that the marriage relation shall be established between them. A meeting of minds is necessary, generally speaking, in order to a valid contract, but oftentimes what courts enforce is not the thing which two parties have actually agreed upon; what they enforce is the obligation arising from the consent of one, and the estoppel against the other to deny a corresponding consent. Suppose a man takes a woman before a clergyman or a magistrate, and undertakes to go through a ceremonial marriage, and, instead of answering affirmatively the most important question in the ceremony, answers negatively by adding the word "not" just loud enough for two or three convenient witnesses to hear. To make the case plainer, suppose he adds between other responses statements to those witnesses to the effect that the whole proceeding is a sham. Suppose he then leads the woman to the church door, and abandons her there, and states that the whole proceeding has been a farce. We may concede that there is no marriage between them. We may concede that the case is similar to the one which has been dealt with in our courts quite frequently, where both parties have gone through an apparently valid marriage ceremony, but in jest, and without matrimonial intent. But suppose the man consummates this marriage—takes the woman to himself before the world as his wife. Can there be any question that he would be estopped to deny that he had consented? Suppose, to take another case, a man and woman enter into a written contract of marriage, and, by some obscure use of words, or by the use of ink which is not visible at the time the contract is signed, it is made to appear that the man had no intention whatever to enter into the marriage state with the woman. If she acts in good faith, and relies on his representation, and yields herself to him as his wife—gives up all her other opportunities of marriage—would he be allowed to prove his actual intent at a later time?

I do not think that I ought to hold that the Court of Errors and Appeals meant to exclude the operation of this great equitable doctrine of estoppel from all consideration in determining whether an effective concurrent consent has been given between a man and woman in order to establish the marriage state. It seems to me, if the case settles anything on this subject of estoppel, it establishes sub silentio that the particular facts in that case did not make out an estoppel against Voorhees.

The third class of cases of the kind to which I have referred embraces those where the disability on the part of one party exists, but is unknown to either,[43] and where both parties in good faith believe that no disability in fact exists, and therefore actually intend to enter into the marriage state. That is this case. In the opinion of Chief Justice Beasley in the Voorhees Case, it is distinctly admitted that in such a case as is now before this court a subsequent removal of the incapacity of one of the two parties marks the commencement of a valid marriage between them. He distinguishes such a case as this from the Breadalbane Case, and the distinction is perfectly plain. Referring to the opinion of Lord Westbury in the Breadalbane Case, the Chief Justice uses the following language (I read from page 558, 47 N. J. Eq., page 1055, 22 Atl.): "He [that is, Lord Westbury] does not pretend that he can find anything in its favor [that is, the doctrine which he lays down], and in his remarks he strangely compares the case before him with those instances where the parties intended originally to marry, and not to commit adultery; their intent being frustrated by the existence of some unknown obstacle. And yet it is presumed that no one who will look with any care into the subject will have the slightest doubt that these two classes of cases, with respect to the methods of their proof, respectively rest upon entirely different foundations, for, when the parties have intended marriage, being ignorant of an existing impediment, all that is to be established by cohabitation apparently matrimonial subsequent to the removal of such impediment is the carrying into effect by the parties of their original purpose; but, when the original purpose was to live in adultery, the evidence under similar circumstances must be sufficient to show an abandonment of such purpose and the commencement of a new one. These lines of cases can be confounded only by want of careful observation of the principles upon which they rest."

It seems to me that the distinction which Chief Justice Beasley so sharply draws between the Breadalbane Case and this Chamberlain Case now before this court is perfectly plain. The strange thing to me, which, perhaps, may be due to my inability to analyze these cases correctly, is that the great Chief Justice should have supposed that the Breadalbane Case, and the Voorhees Case are in the same class. In the Breadalbane Case the original purpose of both parties was to live in adultery, covering up their adulterous connection by the false appearance of marriage. In the Voorhees Case the unfortunate woman

[43] In the following cases, also, neither party knew of the impediment, and it was held that continued cohabitation after removal of the obstacle made them legally husband and wife: Poole v. People, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. Rep. 245 (1898); Taylor v. Taylor, 63 App. Div. 231, 71 N. Y. Supp. 411 (1901); Schuchart v. Schuchart, 61 Kan. 597, 60 Pac. 311, 50 L. R. A. 180, 78 Am. St. Rep. 342 (1900); Manning v. Spurck, 199 Ill. 447, 65 N. E. 342 (1902); Eaton v. Eaton, 66 Neb. 676, 92 N. W. 995, 60 L. R. A. 605, 1 Ann. Cas. 199 (1902); Land v. Land, 206 Ill. 288, 68 N. E. 1109, 99 Am. St. Rep. 171 (1903).

had no criminal intent, but from the start intended to live in marriage relations with the man who pretended that he could marry her. As I said before, no one suggested that this man Voorhees might or ought to have been held estopped to deny his matrimonial intent at the first moment when the matrimonial intent on his part became possible. In my opinion, there is almost as wide a distinction between the Voorhees Case and the Breadalbane Case as there is between the Breadalbane Case and this Chamberlain Case.

I think that Chief Justice Beasley, speaking for the Court of Errors and Appeals, plainly admits that in a case like this, where the parties come together and in the most solemn manner accept each other as husband and wife, and concurrently intend to establish that relation, and manifest that concurrent intention in the usual solemn form before a clergyman or a magistrate, they do not intend to live in adultery, and if, in fact, by reason of an unknown impediment (an unknown incapacity on the part of one of them to contract the marriage which they have attempted to contract), they have begun in fact to live in adultery, then, upon a subsequent removal of the impediment, if they continue to cohabit as man and wife (continue to live in precisely the same way in which they began to live together), such subsequent continued cohabitation must be deemed matrimonial, in accordance with the original intent, and cannot be deemed illicit, in accordance with an intent which neither of them ever had.

The three classes of cases which I have described seem to me to be essentially distinct from each other. In the first class, of which the Breadalbane Case is the type, both parties know of the impediment. Both intend not to marry, but to live in adultery. Both intentionally make a false pretense of marriage before the world in order to conceal their meretricious relation.

In the third class, to which this case and the case of De Thoren v. Attorney General, L. R. 1 App. Cas. 686, cited by Mr. Justice Garrison in his dissenting opinion, belong, both parties are ignorant of the impediment; both intend in good faith to marry, and do not intend to commit adultery; both believe that they are in fact lawfully married; and both make an honest representation to the world to that effect.

In the second class, which is intermediate between the others, and to which the Voorhees Case belongs, one of the two parties is in the situation of both parties in the Breadalbane Case, and the other party is in the situation of both parties in this Chamberlain Case and the De Thoren Case.

In determining the effect on the status of the parties in each of these classes of cases which is produced by the removal of the impediment while the cohabitation apparently matrimonial continues, it seems to me that a rule laid down in one of the classes of cases may be plainly inapplicable to either of the others. The three situations seem

to be widely variant, and to call for the application of radically different principles of morals and public policy. * * *

If I am right in the view which I have expressed in regard to the application of the great doctrine of estoppel in cases like this and in cases like the Voorhees Case, in establishing a lawful marriage, by preventing one of the parties from denying that he or she concurrently with the other consented to the establishment of the status of marriage between them, as I think I intimated earlier, there is another ground upon which the marriage between these parties may be rested. If the marriage should be established for this reason, then, as I said, it would date, not from the removal of the disability, but from the time when the defendant made the representations to the complainant that he was her husband and she was his wife, and that no further marriage ceremony was necessary between them, and the complainant acted on those representations. Even if we might suppose that these declarations are not evincive, beyond doubt, of the matrimonial intent on the part of the defendant—if there is any theory of the case upon which it might be held that the intent of the defendant in living with this woman in the apparent relation of marriage after the divorce had been obtained was not bona fide, and that his intent in maintaining those relations must be referred back to the actual state of things when the marriage ceremony was performed—I strongly incline to think that the defendant should be held estopped to deny the existence of the matrimonial intent which he manifested so distinctly when he persuaded this woman that no further marriage was necessary, and induced her to continue living with him as his wife. She acted upon the intent which he manifested to her, and it seems to me that sound law, sound morals, require that the defendant, whatever his actual intent might have been, must be held estopped to deny the intent which he exhibited and manifested beyond doubt by representations upon which the complainant acted for years.

This case can plainly be distinguished from the Voorhees Case on account of the positive representations and assurances which the defendant made directly to the complainant after her divorce had been obtained, and upon which she acted in continuing to cohabit with him as his wife. I am bound, whatever my private opinion may be, to apply the law of the Voorhees Case while that case stands not overruled nor even modified, but I am not bound to extend the law of that case to other cases presenting a substantially different state of facts. * * *

I have perhaps said too much about the doctrine of estoppel in its application to this case, because, apart from that doctrine, I think the decision of this present case may be rested firmly upon the proposition that the proofs show beyond the shadow of a doubt that from the date of the divorce in this case, which removed this woman's incapacity to marry, the man and woman lived together as husband and wife, believing that they were husband and wife, consenting that the

status of marriage should exist between them, and believing that such marriage status did exist. This, in my judgment, makes a marriage, and it is immaterial whether there was a particular date when some ceremony was pronounced between them, or some form of words was employed. It is enough if they concurrently intend that the marriage status shall exist between them, and each knows that the other so intends. All the rest is a mere matter of proof. * * *

My conclusion is that the complainant is entitled to a decree which will make the defendant liable, under the statute, to provide for her support and maintenance. The abandonment and neglect and refusal to support are proved in this case beyond doubt, and the decision which I have rendered disposes of the only defense which is worthy of consideration. * * *[44]

(B) Grounds for Annulment Based on Lack of a Real Consent[45]

(a) Fraud

MOSS v. MOSS (Otherwise ARCHER).

(High Court of Justice, 1897. Prob. Div. 263.)

The following written judgment was delivered by

Sir F. H. Jeune, President.[46] In this case the petitioner seeks to have his marriage with the respondent declared null and void, on the ground that, without his knowledge in fact, and without any neglect on his part to make himself acquainted with the truth, his wife was pregnant by another man at the time of his marriage with her.

[44] In addition to the cases cited in the main case and notes, see, also, for further cases and discussion, note to Clark v. Barney, 24 Okl. 455, 103 Pac. 598 (1909), in 8 Mich. Law Rev. 325; note to Geiger v. Ryan, 123 App. Div. 722, 108 N. Y. Supp. 13 (1908), in 8 Col. Law Rev. 503, and note to the principal case in 19 Harv. Law Rev. 471.

See Pettitt v. Pettitt, 105 App. Div. 312, 93 N. Y. Supp. 1001 (1905), and Turner v. Turner, 189 Mass. 373, 75 N. E. 612, 109 Am. St. Rep. 643 (1905), for effect of statutes.

To the effect that, where the relation is meretricious in the beginning, it presumptively continues the same, see Pike v. Pike, 112 Ill. App. 243 (1904); Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N. S.) 190 (1908); Henry v. Taylor, 16 S. D. 424, 93 N. W. 641 (1903). Cf. Darling v. Dent, 82 Ark. 76, 100 S. W. 747 (1907), to the effect that there is no presumption either way; the character of the relation being matter of proof alone.

[45] On the nature of consent, see Hyde v. Hyde and Woodmansee, L. R. 1 P. & D. 130 (1866); held marriage of a man and woman professing polygamy, in a country were polygamy is lawful, is not a marriage in England, although at the time of marriage both the man and woman are single and have capacity to marry. On the effect of secret mental reservations of one party, not known to the other, see Hilton v. Roylance, 25 Utah, 129, 69 Pac. 660, 58 L. R. A. 723, 95 Am. St. Rep. 821 (1902), and In re Imboden's Estate, 111 Mo. App. 220, 86 S. W. 263 (1905).

[46] The statement of facts and argument of counsel are omitted. That part of the opinion relating to continental and American decisions is also omitted.

I find that these allegations of fact were proved. It was also stated that the connection of the respondent with the father of her child was incestuous. The proof of this was not made complete. I do not know whether it could have been; but the allegation was admitted to be immaterial for the purposes of the present case. Had the connection been with a relative, within the forbidden degrees, of the petitioner, there is high authority for saying that the marriage would have been incestuous and void.

On these facts, the argument before me was that there was fraud by the wife in regard to the essentials of marriage, and that, therefore, the marriage was null and void. It would perhaps be sufficient for me to say that for this proposition no authority in the English law can be found, and it would be impossible for this Court, at the present day, to give assent to a principle of such importance, and so far-reaching, without the sanction of precedent. The absence of English authority was, indeed, almost, if not quite, admitted on behalf of the petitioner, and the argument in his favour was mainly based on the reasoning in decisions of some of the American Courts. But the case was argued by Mr. Deane with so much earnestness and ability that I feel bound to state my view of the English authorities to which he referred, and to indicate the difference, as I conceive it to exist, between the law as understood in England and that laid down in other countries, and especially in certain States of America on the point in question.

In the case of Swift v. Kelly, 3 Knapp, 257, at page 293, decided in 1835, the Judicial Committee of the Privy Council, Lord Brougham, Baron Parke, and Shadwell, V. C., being members of the Board, expressed its opinion in the following terms: "It should seem, indeed, to be the general law of all countries, as it certainly is of England, that unless there be some positive provision of statute law, requiring certain things to be done in a specified manner, no marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances, consent never would have been obtained. Unless the party imposed upon has been deceived as to the person, and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made."

It is not necessary to inquire how far the law of other countries may be supposed at that time to have been the same as that of this country; but I think that the above words, unqualified as they are, do represent with substantial accuracy the law of England. While habitually speaking of marriage as a contract, English lawyers have never been misled by an imperfect analogy into regarding it as a mere contract, or into investing it with all the qualities and conditions of ordinary civil contracts. They have expressed their sense of its distinctive character in different language, but always to the same effect. Lord Stowell said that it was both a civil contract and a re-

ligious vow—Turner v. Meyers, 1 Hagg. Cons. 414—referring, no doubt, mainly to the incapacity of the contracting parties to dissolve it. Dr. Lushington spoke of it as more than a civil contract. Miles v. Chilton, 1 Rob. 684, 694. Lord Hannen said: "Very many and serious difficulties arise if marriage be regarded only in the light of a contract. It is, indeed, based upon the contract of the parties, but it is a status arising out of a contract. Sottomayer v. De Barros, 5 P. D. 94, 101. The late President, Sir Charles Butt, said, in the case of Andrews v. Ross, 14 P. D. 15, that "the principles prevailing in regard to contract of marriage differ from those prevailing in all other contracts known to the law."

It is not necessary to enumerate all those differences. The most striking of them are familiar. The parties who contract a marriage cannot at their will dissolve it. Excepting for the moment such fraudulent concealment or misrepresentation as is alleged in the present case, no fraudulent concealment or misrepresentation enables the defrauded party who has consented to it to rescind it. Incapacity to consent arising from mental weakness is a fatal objection, not only if urged by or on behalf of the person unable to consent, but if put forward by the capable party to the contract. See Hunter v. Edney, 10 P. D. 93; Durham v. Durham, 10 P. D. 80. Again, if both parties to the contract knowingly and willfully marry without compliance with the law as to publication of banns, either can have the marriage declared null—Andrews v. Ross, 14 P. D. 15—a state of the law which drew from the late President the observation above quoted. I do not mean that, regarding marriage as a contract, explanations more or less far-fetched might not be given of these peculiarities, in order to force the law of marriage into line with the law of ordinary civil contract; but English Courts have not resorted to these expedients, and, while not taking a pedantic objection to the use of the term contract as applied to marriage, they have been content to recognize characteristic peculiarities in the nature and incidents of the marriage contract.

The result is that the English law of the validity of marriage is clearly defined. There must be the voluntary consent of both parties. There must be compliance with the legal requirements of publication and solemnization, so far as the law deems it essential. There must not be incapacity in the parties to marry either as respects age or physical capability or as respects relationship by blood or marriage. Failure in these respects, but I believe in no others (I omit reference to the peculiar statutory position of the descendants of George II.) renders the marriage void or voidable. It has been repeatedly stated that a marriage may be declared null on the ground of fraud or duress. But, on examination, it will be found that this is only a way of amplifying the proposition long ago laid down (Fulwood's Case [1638] Cro. Car. 482, 488, 493) that the voluntary consent of the parties is required. In the case of duress with regard

to the marriage contract, as with regard to any other it is obvious that there is an absence of a consenting will. But when in English law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent. The simplest instance of such fraud is personation, or such a case as that supposed by Lord Ellenborough in Rex v. Burton-on-Trent, 3 M. & S. 537, of a man assuming a name to conceal himself from the person to whom he is to be married. In Portsmouth v. Portsmouth, 1 Hagg. Ecc. 355, and Harrod v. Harrod (1854) 1 K. & J. 4, the fraud consisted in taking advantage of a mind not absolutely insane, but weak, to induce in the one case a man, in the other a woman, to enter into a contract, which (to use the phrase of Wood, V. C., in the latter case) he or she did not understand. Browning v. Reane (1812) 2 Phillim. 69, and Wilkinson v. Wilkinson (1845) 4 N. of C. 295, are other cases of the same kind.

In all these, and I believe in every case where fraud has been held to be the ground for declaring a marriage null, it has been such fraud as has procured the form without the substance of agreement, and in which the marriage has been annulled, not because of the presence of fraud, but because of the absence of consent. This is illustrated by the imaginary case suggested by Lord Campbell in Reg. v. Millis (1844) 10 Cl. & F., 534, 785, of a mock marriage in a masquerade where the kind of result which fraud might have produced would be produced by mistake. In such an instance there would be no fraud, but for want of real consent the marriage would be declared void. But when there is consent no fraud inducing that consent is material. Lord Stowell has at least three times expressed this in the most emphatic language. In Wakefield v. Mackay, 1 Phillim. 134, note, 137, that learned judge said: "Error about the family or fortune of the individual though procured by disingenuous representations does not at all affect the validity of the marriage;" in Ewing v. Wheatley, 2 Hagg. Cons. 175, 183: "It is perfectly established that no disparity of fortune or mistake as to the qualities of the person will impeach the vinculum of marriage;" and in Sullivan v. Sullivan, 2 Hagg. Cons. 238, at page 248: "The strongest case you could establish of the most deliberate plot, leading to a marriage the most unseemly in all disproportions of rank, of fortune, of habits of life, and even of age itself, would not enable this Court to release him from chains which, though forged by others, he had riveted on himself. If he is capable of consent and has consented, the law does not ask how the consent has been induced."

The only authorities which were, before me, referred to as in any degree inconsistent with these views are the case of Miss Turner's Marriage Act, and a dictum of the late President in Scott v. Sebright, 12 P. D. 21. Neither of these deals with such facts as are relied on in the present case, and they can be put forward at most as

sanctioning a somewhat wider application of the doctrine of fraud as a ground for annulling marriage than the above authorities indicate. In the case of Miss Turner the marriage was annulled by Act of Parliament. It is not possible to say exactly on what ground the votes of the legislators were given; but it is suggested that the marriage was brought about, as indeed it was, by conduct into which fraud largely entered. It might be sufficient to say of this decision that, as was pointed out in Templeton v. Tyree, L. R. 2 P. & M. 420, it was an Act of the Legislature, not necessarily, therefore, proceeding on the principles of the Ecclesiastical Courts, which, in nullity cases, are the guide of this tribunal. It is also to be remarked that, in fact, the case was never brought before the Ecclesiastical Court, though, no doubt, the omission to do so was explained by Lord Eldon in the House of Lords and Mr. Peel in the House of Commons to have been caused by the impossibility of placing the evidence of Miss Turner, as a party, before the Ecclesiastical Courts, 17 Hansard (2d Series) 787, 1134. But a stronger observation, I think, is that duress is distinctly alleged in the petition, 59 Lords' Journ. 308, and that the evidence in the case clearly proved that not only by fraudulent misrepresentations of fact but by duress of threats, such apparent consent as was given was extorted from the victim of this treatment. In Scott v. Sebright, 12 P. D. 21, 23, the late President said: "The Courts of Law have always refused to recognize as binding contracts to which the consent of either party has been obtained by fraud or duress, and the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract." Standing by themselves, these words may appear capable of a wider effect than any other English authority of which I am aware would warrant. But read in connection with the facts before the Court, which shewed a case of deception and force acting on a weakened mind, they do not appear to me to go further than to lay down that in the case of marriage, as in that of other contracts, fraud and duress may be so employed as to render an apparent consent in truth no consent at all.

The principles thus long and uniformly asserted by the English Courts, and the very fact that the point has never been raised, appear to me to be so conclusive on the present question that, even if it could be shewn that authority to the contrary could be found in the Canon law, I should say that that authority has not been accepted in this country. But as a fact I think that the principles above indicated may be traced back to the Canon law. I do not propose to enter into any detailed examination of the Canon law on this subject, and I am well aware that the question has been considered not to be free from doubt, but my own opinion is that the Canon Law clearly refuses to allow a marriage to be declared null on the ground of previous unchastity of the wife, and goes far to declare that the only fraud which vitiates marriage is that which goes to the consent.

I will quote only one authority, but that a high one. Ayliffe in his Parergon, p. 361, says: "Matrimony ought to be contracted with the utmost freedom and liberty of consent imaginable, without fear of any person whatsoever; for matrimony contracted through any menace or impression of fear is null and void ipso jure; * * * for marriages contracted against the will of either of the parties are usually attended with very bad and dismal consequences. * * * I have just now observ'd that the principal thing required to a legal marriage is the consent of the parties contracting, which is sufficient alone to establish such a marriage. And tho' there is nothing more contrary to consent than error, yet every error does not exclude consent. Wherefore I shall here consider what kind of error it is, according to the canon law, that hinders or impeaches a matrimonial consent and renders it null and void ab initio. Now there are four species of error, which are hereunto referr'd. The first is stiled error personæ, as when I have thoughts of marrying Ursula; yet by my mistake of the person I have marry'd Isabella. For an error of this kind is not only an impediment to a marriage contract, but it even dissolves the contract itself, through a defect of consent in the person contracting. For deceit is oftentimes wont to intervene in this case; which ought not to be of any advantage to the person deceiving another. A second species is stiled an error of condition; as when I think to marry a free woman, and through a mistake I have contracted wedlock with a bondwoman and so vice versa; for by the canon law such an error is an impediment to a matrimonial contract. But as there is now no such thing among Christians as persons that are truly bondmen or bondwomen (this kind of bondage or servitude being now abolish'd among us by the advantage of the Christian religion) I shall not long insist on this head. But if a freedman marry'd a bondwoman, knowing her to be such, the Church did not dissolve such a marriage. And thus we read that the marriage between Abraham and Agar the handmaid was a true and valid marriage. The third species is what we call error fortunæ; and is when I think to marry a rich wife and in truth have contracted matrimony with a poor one. But this error does not, even by the canon law, dissolve a marriage contract made simply and without any condition subsisting. But 'tis otherwise by that law if I have contracted with a person to marry her upon condition that she is worth so many thousand pounds, and the condition is not made good. The last species is stiled an error of quality—viz., when a person is mistaken in respect of the other's quality, with whom he or she contracts. As when a man marries Berta, believing her to be a chaste virgin, or of a noble family and the like, and afterwards finds her to be a person deflower'd or of a mean parentage. But according to the common opinion of the doctors this does not render the marriage invalid; because matrimony celebrated under such kind of error, in point of consent, is deem'd to be simply voluntary as to

the nature and substance of it, though in respect of the accidents 'tis not voluntary." * * *

I am sorry for the undeserved misfortune of the petitioner, but the petition must be dismissed. Petition dismissed.[47]

ALLEN'S APPEAL.

(Supreme Court of Pennsylvania, 1882. 99 Pa. 196, 44 Am. Rep. 101.)

Libel for divorce a vinculo matrimonii, by William Allen against Hannah Allen, formerly Hannah Duval. The libellant alleged that said Hannah was pregnant by another at the time of marriage, that he had never had sexual intercourse with her prior to his marriage, was unaware of her unchastity and that, about seven months after the marriage, a child, of which he was not the father, was born. The respondent denied fraud on her part, and averred that the libellant was the father of the child, and that she had not prior to her marriage had sexual intercourse with any man other than the libellant.

Verdict for the libellant, and judgment thereon. Respondent appealed.[48]

SHARSWOOD, C. J. By the first section of the Act of May 8th, 1854, Pamph. L. 644, it is provided that "it shall be lawful for the courts of common pleas of this Commonwealth to grant divorce where the alleged marriage was procured by fraud, force or coercion." By this language must of course be understood such fraud as would at common law render a marriage void. It is settled beyond all controversy, that fraud which would vitiate any other contract —even an executory contract to marry—will not have that effect when the marriage has actually been solemnized and consummated. "It is well understood," says Chancellor Kent, "that error and even disingenuous representation, in respect to the qualities of one of the contracting parties in his condition, rank, fortune, manners and character, would be insufficient. The law makes no provision for the relief of a blind credulity, however it may have been produced." 2 Kent's Comm. 77.[49] It assumes that the party in entering into so

[47] In Franke v. Franke (Cal.) 31 Pac. 571 (1892), it was held that pregnancy at time of marriage did not constitute physical incapacity under Civil Code, § 82.

See an article entitled "Nullity of Marriage," by Franklin G. Fessenden, in 13 Harv. Law Rev. 110, discussing the English and American cases on fraud as a ground for a decree of nullity.

[48] A brief statement of facts is substituted for that in the report and part of the opinion is omitted.

[49] The following also have been held to be no ground for nullifying the marriage: False statement as to previous marriage, Donnelly v. Strong, 175 Mass. 157, 55 N. E. 892 (1900); false statement that defendant had no divorced spouse living, where plaintiff belonged to a church by whose tenets such a marriage was invalid, Boehs v. Hanger, 69 N. J. Eq. 10, 59 Atl. 904 (1905); error as to chastity of wife before marriage, Delpit v. Young, 51 La.

solemn a contract—involving the most important duties and responsibilities for life, and upon which his happiness so much depends—has made all proper inquiries or is willing to take the other party upon trust without inquiry. According to the form of the marriage service of the Church of England, each party takes the other "for better, for worse, for richer, for poorer, in sickness and in health, to love and to cherish till death them do part according to God's holy ordinance." The fraud must be in what has been sometimes termed the essentialia of the contract. False personation by one of another person would undoubtedly be such a case. As to any other it will be found difficult, after looking through all the authorities, to lay down any rule which can sharply define and distinguish what are and what are not essentials.

Every case must, to some extent, depend on its own circumstances. Thus it is well settled that want of chastity on the part of the woman—ante-nuptial incontinence—even though she may have expressly represented herself as virtuous—forms no ground for avoiding the contract. Mr. Bishop, who has studied the subject with great care and research, in his valuable treatise on Marriage and Divorce, § 179, considers, that on well-established principles, if the woman has even been a common prostitute, and has reformed her life, yet conceals her former misconduct, the marriage would still be good. The marriage contract is an express renunciation by her of all unlawful intercourse with others than her husband; and he makes a similar renunciation. According to the marriage service before referred to, they both solemnly promise, "forsaking all others," to keep themselves solely to each other. I consider this marriage service as good evidence of the ancient common law of England. This seems to be also the dictate of humanity and in conformity to the gospel which so strongly throughout inculcates the rule of mutual forgiveness. For otherwise, one of strong passions, led astray by them or seduced by the wicked arts of others, could have no hopes from reform. In such cases it is best for society that the past should be entirely buried in oblivion, and that the poor, erring creature should have the chance of a new life of respectability and honor. It is best that the other party should know, when the sin is afterward revealed to him, that it can do no good, but unmixed evil, to make it public by applying for a divorce. They must learn to submit to the inevitable. In this country—certainly in this state—adultery is a ground for divorce a vinculo matrimonii; so that if there should be a relapse after marriage, the marriage can be annulled. The only practical result, therefore, of declaring the marriage absolutely void, ab

Ann. 923, 25 South. 547 (1899); false statement that defendant had not had an attack of epilepsy for eight years, Lyon v. Lyon, 230 Ill. 366, 82 N. E. 850, 13 L. R. A. (N. S.) 996, 12 Ann. Cas. 25 (1907); false statement as to wealth, Kessler v. Kessler, 2 Cal. App. 509, 83 Pac. 257 (1905). And see note to Lyon v. Lyon, supra, in 13 L. R. A. (N. S.) 996.

initio, for simple ante-nuptial incontinence—whether in one instance or many—would be to render innocent children illegitimate. And if ante-nuptial incontinence be a sufficient ground of nullity as against the woman, it is not easy to see why it should not be so likewise against the man, and the consequences of such a doctrine it is not difficult to predict.

Actual pregnancy at the time of the marriage presents an entirely different question. It introduces a different element. The marriage status of the parties is changed. The man is then necessarily put to the alternative of either publishing his wife's shame or submitting to have the child of a stranger, an alien to his blood, introduced, recognized and educated as his own legitimate offspring. If a man, indeed, marries a woman knowing her to be pregnant, even though he may believe that he is the father, he cannot set up the fraud, if afterwards discovered; for no man would do such a thing unless conscious of having had himself previous connection with her; and though she may have falsely assured him that the child was his, if he chooses to rely on that assurance he must bear it as a misfortune. In one very strong case, where, the parties being white, the child born after the marriage proved to be a mulatto, yet the woman simply concealed from the man the fact of having received a negro's embraces about the time she did his, the marriage was adjudged valid. Scroggins v. Scroggins, 14 N. C. 535. In support of these general views it will be sufficient to refer besides to Reynolds v. Reynolds, 3 Allen (Mass.) 605; Leavitt v. Leavitt, 13 Mich. 452; Hedden v. Hedden, 21 N. J. Eq. 61; Farr v. Farr, 9 D. C. 35; Foss v. Foss, 12 Allen (Mass.) 26; Crehore v. Crehore, 97 Mass. 330, 93 Am. Dec. 98; Baker v. Baker, 13 Cal. 87; and our own case of Hoffman v. Hoffman, 6 Pa. 417. "There is no absolute rule," says Mr. Bishop (section 180), "that pregnancy will entitle him (the husband) on discovering the fact to have the marriage declared void. In some circumstances it will, in others it will not; depending on the extent and nature of the fraud in the particular instance, as appearing in the facts special to the individual case."

Applying these principles to the facts of this case, we think that under the evidence it was submitted to the jury with proper instructions. There was no sufficient evidence that the libellant had ever had sexual intercourse with the respondent before marriage. He positively denied it. The respondent indeed swore that it was his child. She admitted that she had said that it was the child of Samuel Williams, but that it was at Allen's request upon a promise that if she would, he would live with her. This again he utterly denied. It was a strange story, but the jury were the judges of the credibility of the witnesses. The child was born about seven months after the marriage, so that there could have been nothing in her appearance at that time to indicate her condition. It was certainly not necessary that she should have expressly denied her pregnancy before the

marriage. No man would think of asking such a question of a woman he was about to make his wife. It would be regarded by her as an insult, if she was, as he then must have supposed, a virtuous woman. * * *

Decree affirmed and appeal dismissed at the costs of the appellant.[50]

STATES v. STATES.

(Court of Chancery of New Jersey, 1883. 37 N. J. Eq. 195.)

On bill for divorce.

BIRD, V. C. A divorce is asked for in this case, on the ground of fraud. Two and a half months after the marriage the defendant gave birth to a fully-developed child. The complainant declares that he is not the father of it. Taking this to be true, then what?

The complainant says that he "was induced by the enticements and allurements" of the defendant "to have sexual intercourse with her, and that afterwards (about two months) she represented to him that she was about two months advanced in pregnancy, and that her offspring would be his," and that a physician, whose name she gave, assured her that the period of gestation had been running about two months. He trusted in these representations.

Now, is he entitled to the aid of a court of conscience? Can a man, who has been guilty of one of the grossest acts of immorality, expect any court to undo the toils which envelop him because of such immorality? Would any court, after listening to his confession, be justified in dissolving his fetters? I think not. He transgressed, and this transgression blinded him; otherwise, too, he would have been

[50] Accord: Ritter v. Ritter, 5 Blackf. (Ind.) 81 (1839); Reynolds v. Reynolds, 3 Allen (Mass.) 605 (1862); Baker v. Baker, 13 Cal. 87 (1859); Caris v. Caris, 24 N. J. Eq. 516 (1873); Sissung v. Sissung, 65 Mich. 168, 31 N. W. 770 (1887); Harrison v. Harrison, 94 Mich. 559, 54 N. W. 275, 34 Am. St. Rep. 364 (1893); Sinclair v. Sinclair, 57 N. J. Eq. 222, 40 Atl. 679 (1898). But the husband may condone the fraud by living with the wife after knowing the facts. Lenoir v. Lenoir, 24 App. D. C. 160 (1904).

The following cases have held concealment of a loathsome venereal disease to be ground for annulling the marriage: Ryder v. Ryder, 66 Vt. 158, 28 Atl. 1029, 44 Am. St. Rep. 833 (1892); Anonymous, 21 Misc. Rep. 765, 49 N. Y. Supp. 331 (1897); Crane v. Crane, 62 N. J. Eq. 21, 49 Atl. 734 (1901); Smith v. Smith, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. Rep. 440 (1898); Svenson v. Svenson, 178 N. Y. 54, 70 N. E. 120 (1904), although defendant had practically recovered at the time the decree was applied for. In Vondal v. Vondal, 175 Mass. 383, 56 N. E. 586, 78 Am. St. Rep. 502 (1900), annulment was refused where the disease at the time was probably not contagious, although it might be transmitted to the offspring, the marriage having been followed by four months' cohabitation.

On the effect of consummation, or lack of it, in obtaining a decree of nullity, see Robertson v. Cole, 12 Tex. 356 (1854); Lyndon v. Lyndon, 69 Ill. 43 (1873). And see Bish. Mar., Div. and Sep. §§ 316, 331–364, 456–464. Cf. article in 13 Harv. Law Rev. 110, at pages 121, 122.

free from importunities to marry, and from all false statements as to his liability.

Then why should he have been deceived by her entreaties or representations? He knew of her dishonor; he knew as well that she would deceive. He had participated with her in crime; why, then, should he be surprised by her falsehoods? She advertised her infidelity as well as her unchastity.

But the avenue for full information was before him. The defendant herself opened the door. She told him she had consulted a physician. Why did not he do the same? An examination by an expert would have revealed the true condition of the fœtus.

The master reports neither for nor against the petitioner, but encourages the favorable action of the court because of the youth and good standing of the complainant. He was of the age of twenty years; certainly not too young to know that he both violated the law of his country and sinned against the honor and integrity of the family which he now holds up as a shield. Good standing is a tower of strength to the innocent; but the confessedly guilty are on the same level as any other wrong-doer.

There is no countenance in law for the prayer of the complainant. It is expressly repudiated in Carris v. Carris, 24 N. J. Eq. 516.

I shall advise that the bill be dismissed.[51]

TAIT v. TAIT.

(Superior Court of New York City, 1893. 3 Misc. Rep. 218, 23 N. Y. Supp. 597.)

Bill to have marriage contract declared null on the ground of fraud.

McAdam, J. The plaintiff had been carnally intimate with the defendant, who was then a widow. To induce him to marry her, she represented that she was pregnant by him, and that the birth of the child would bring upon the three shame and disgrace, whereupon, to avoid the humiliation, he married her, believing the representation to be true. The marriage was never consummated by cohabitation. The plaintiff now asks that the marriage contract be annulled on the ground of fraud. The defendant makes no defense. The most important contract of life is marriage, the essence of which is consent, and where this is obtained by fraud it goes to the root of the obligation and avoids it. The party guilty of the wrong cannot take advan-

[51] Accord: Crehore v. Crehore, 97 Mass. 330, 93 Am. Dec. 98 (1867); Franke v. Franke (Cal.) 31 Pac. 571 (1892); Seilheimer v. Seilheimer, 40 N. J. Eq. 412, 2 Atl. 376 (1885); Foss v. Foss, 12 Allen (Mass.) 26 (1866); Hoffman v. Hoffman, 30 Pa. 417 (1858). Cf. Barden v. Barden, 14 N. C. 548 (1832), and Scott v. Shufeldt, 5 Paige Ch. (N. Y.) 43 (1835), where the child born was a mullatto and the parties to the suit were white, nullity being allowed. Also cf. Wallace v. Wallace, 137 Iowa, 37, 114 N. W. 527, 14 L. R. A. (N. S.) 544, 126 Am. St. Rep. 253, 15 Ann. Cas. 761 (1908), where under facts similar to those in the principal case a divorce was allowed under Code, § 3175.

tage of it, while the other party, if he chooses, may waive his objection and make the marriage good. The fact of the marriage not having been consummated has, therefore, in many instances influenced the court in favor of setting it aside. Bish. Marr. & Div. (4th Ed.) § 214.

What ought to be done in this case? The plaintiff, by his immoral act, put himself in a position where he could not tell whether the defendant was or was not in the condition she described; in other words, he put himself, by his own act, into her power. The question presented came before the court in Hoffman v. Hoffman, 30 Pa. 417, where it was held that if a woman pretends to a man that she is pregnant by him, and she is not pregnant at all, but he marries her, believing her representation to be true, he cannot have the marriage set aside for this fraud. This case is conclusive against the present application. In Jackson v. Winne, 7 Wend. 47, 22 Am. Dec. 563, it was held that the circumstance of a party being under arrest as the putative father of a bastard child is not enough to avoid a marriage on the ground of fraud or duress, and in a somewhat similar decision (Scott v. Shufeldt, 5 Paige, 43) the fact that the child, when born, turned out to be black instead of white (the color of the parents), did not seem to have much weight in the determination of the legal proposition involved. See, also, Crehore v. Crehore, 97 Mass. 330, 93 Am. Dec. 98; Foss v. Foss, 12 Allen (Mass.) 26; Scroggins v. Scroggins, 14 N. C. 535; Barden v. Barden, 14 N. C. 548. The fraud practiced on the plaintiff was the outcome of his illicit relations with the defendant, and while his "marriage was a failure" from the time of its ceremonial, the result may be imputed to concubinal origin rather than to any imperfection in the institution itself.

For these reasons the court declines to grant the decree applied for. Motion denied.[52]

DI LORENZO v. DI LORENZO.

(Court of Appeals of New York, 1903. 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. Rep. 609.)

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Gregorio Di Lorenzo against Johanna Di Lorenzo. From a judgment of the Appellate Court (71 App. Div. 509, 75 N. Y. Supp. 878) reversing a judgment in favor of the plaintiff and granting a new trial, plaintiff appeals. Reversed.

This action was brought to have the marriage between the plaintiff and the defendant annulled upon the ground that the former's consent thereto was induced by the fraud of the latter. It is alleged in the complaint, in substance, that prior to the marriage of the

[52] Accord: Fairchild v. Fairchild, 43 N. J. Eq. 473, 11 Atl. 426 (1887); Richards v. Richards, 28 Pittsb. Leg. J. (N. S.) 16, 19 Pa. Co. Ct. Rep. 322 (1896).

parties, in the city of New York, in November, 1891, the defendant falsely represented to the plaintiff that in October, 1891, during a period of time when he was absent from the state, she had given birth to a male child, of which he was the father, whom she exhibited to him as such; that he, believing these representations, and, in order to legitimatize the child, was induced to marry the defendant; that without such representations he would not have made the marriage; that the defendant's representations were false, in that she had not given birth to any child, but had fraudulently procured one to produce to the plaintiff for the purpose of inducing him to consent to marry her; that, as a result of the stratagem, he did marry her; that there has been no issue of the marriage; that the falsity of these representations was discovered but a short time before the commencement of the action, and that since their discovery he has not cohabited with the defendant. In answer to the complaint, the defendant denied so much of its allegations as related to the fraudulent representations, and set up an earlier marriage with the plaintiff in 1890, which was consummated by cohabitation.

After the joinder of issue, the defendant moved for a jury trial, and the trial court framed specific questions of fact, which were tried out before a jury, who rendered a verdict upon each. The first question was whether the parties had been earlier married by an Italian minister as alleged by the defendant. To this question the jury answered, "No." The second question was whether, in October, 1891, or prior thereto, the defendant, for the purpose of inducing the plaintiff to marry her, falsely and fraudulently represented to him that, during plaintiff's absence from the state, she had given birth to a male child, of which he was the father, and whether she then and there produced and exhibited said child to him. To this question the jury answered, "Yes." The third question was whether the plaintiff, relying upon such representations of the defendant, and believing the same to be true, married the defendant in November, 1891, at the city of New York. To this question the jury answered, "Yes." The fourth question was whether said defendant gave birth to said male child, or to any child, on or about October 5, 1891. To this question the jury answered, "No."

Upon the action coming on regularly to be heard at a Special Term, the court adopted these findings of the jury, and filed a decision embodying the facts established by the verdict, and, further, finding that at the time of the marriage the plaintiff was seised of real estate of the value of $65,000, as the defendant well knew; that there had not been any issue of the marriage; that at the time of the marriage the parties were, and ever since have been, residents of the state; that since the discovery of the defendant's fraud the plaintiff had not cohabited with her, and that the plaintiff was entitled to a judgment annulling his marriage with the defendant. The judgment entered upon the decision was appealed from by the de-

fendant to the Appellate Division in the Second Department, where it was reversed, and a new trial was ordered. From the order of reversal the plaintiff has appealed to this court.

GRAY, J. The order of the Appellate Division reversed upon questions of law only, and the facts as found by the trial court, being undisturbed by the determination of the Appellate Division, must be taken to be true.

The theory of the decision by the Appellate Division, as I understand it, is that the fraud in this case was insufficient to warrant the court in annulling the marriage between the parties, and that the considerations of public policy which environ the marriage relation as a status so far take it out of the domain of ordinary contracts as to render this conclusion necessary. It was considered that the representations of the defendant "worked no wrong for which the law, as at present established," would afford any remedy, in the right to an annulment of the marriage. The prevailing opinion of the learned court is very elaborate and clear, and its conclusions are deliberately reached upon a careful consideration of the authorities. In my opinion, however, it errs in failing to give due effect to the statutory provision relating to the annulment of a marriage for fraud, and in not giving to the element of a free and true consent in a marriage contract that high importance which it has in contracts generally.

The question, therefore, is whether, upon facts establishing that the consent of the plaintiff to marry the defendant was obtained by a fraudulent representation and by a stratagem, causing him to believe that he was the father of the defendant's child, the fraud was of such a material nature as to warrant the court in decreeing the annulment of the marriage contract. The law of this state with respect to matrimonial actions is regulated by statute. The Revised Statutes early conferred upon the chancellor the jurisdiction to declare a marriage contract void and to annul the marriage (2 Rev. St. [1st Ed.] 142), and the Code of Civil Procedure, into which their provisions were carried, confers a general jurisdiction upon the courts of the state, which may be called into exercise for certain causes existing at the time of the marriage. One of those causes is stated to be when "the consent of one of the parties was obtained by force, duress, or fraud"; and the only limitation imposed, where the action is on the ground of fraud, is that it must appear that the parties have not, at any time before the commencement of the action, "voluntarily cohabited as husband and wife, with a full knowledge of the facts constituting the fraud." Code Civ. Proc. § 1743, subd. 4; Id. § 1750. This language is broad, and warrants but the one reasonable construction that the fraud must be material to that degree that, had it not been practiced, the party deceived would not have consented to the marriage.

The statutes of this state declare that marriage, so far as its validity in law is concerned, is a civil contract, to which the con-

sent of parties, capable in law of contracting, is essential. 2 Rev. St. [1st Ed.] 138. It certainly does differ from ordinary common-law contracts by reason of its subject-matter and of the supervision which the state exercises over the marriage relation which the contract institutes. In such respects it is sui generis. While the marriage relation, in its legal aspect, has no peculiar sanctity as a social institution, a due regard for its consequences and for the orderly constitution of society has caused it to be regulated by laws in its conduct as in its dissolution. Judge Story said of it that it is "something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligation different from what belong to ordinary contracts." Story's Conflict of Laws, § 108, note.

While, then, it is true that marriage contracts are based upon considerations peculiar to themselves, and that public policy is concerned with the regulation of the family relation, nevertheless our law considers marriage in no other light than as a civil contract. Kujek v. Goldman, 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156, 55 Am. St. Rep. 670. The free and full consent which is of the essence of all ordinary contracts is expressly made by the statute necessary to the validity of the marriage contract. The minds of the parties must meet in one intention. It is a general rule that every misrepresentation of a material fact, made with the intention to induce another to enter into an agreement, and without which he would not have done so, justifies the court in vacating the agreement. It is obvious that no one would obligate himself by a contract if he knew that a material representation, entering into the reason for his consent, was untrue. There is no valid reason for excepting the marriage contract from the general rule.

In this case the representation of the defendant was as to a fact, except for the truth of which the necessary consent of the plaintiff would not have been obtained to the marriage. It was designed to create a state of mind in the plaintiff, the operation of which would be to yield a consent to marry the defendant in the belief that he was rectifying a great wrong. The minds of the parties did not meet upon a common basis of operation. The artifice was such as to deceive a reasonably prudent person, and to appeal to his sense of honor and of duty. The plaintiff had a right to rely upon the defendant's statement of a fact, the truth of which was known to her and unknown to him, and he was under no obligation to verify a statement to the truth of which she had pledged herself. It was a gross fraud, and, upon reason, as upon authority, I think it afforded a sufficient ground for a decree annulling the marriage contract.

The jurisdiction of a court of equity to annul a marriage for fraud in obtaining it was early asserted in this state by the court of chancery, at a time when the limited powers of courts of law were

inadequate for the purpose. This jurisdiction was expressly rested upon the general power to vacate contracts in all cases where they had been procured by fraud. From this general jurisdiction of equity a contract of marriage was not regarded as being excepted when the assent to it was the result of artifice or of gross fraud. See Ferlat v. Gojon, Hopk. Ch. 478; Burtis v. Burtis, Id. 557. If, as it was observed by Chancellor Sandford in Ferlat v. Gojon, supra, no instance of the exercise of this jurisdiction was to be found in England, it was because the ecclesiastical or spiritual courts had cognizance of matrimonial causes; but he said "the jurisdiction of equity in cases of fraudulent contracts seems sufficiently comprehensive to include the contract of marriage."

In Scott v. Shufeldt, 5 Paige, Ch. 43, the action was to annul a marriage which the plaintiff had been induced to enter into in order to escape proceedings under the bastardy act, which the defendant had brought against him, upon her oath that he was the father of her child. He subsequently ascertained that the child was by a negro. Chancellor Walworth held that: "If the mother, at the time she charged him [the complainant] as the putative father, and induced him to marry her, under the supposition that the child might be his, knew that it was not his child, but that it was the child of a negro, she * * * intentionally defrauded the complainant in such a manner as to authorize the court to declare the marriage contract a nullity." The power that was deemed by the court of chancery to be inherent in the court in the exercise of its equitable jurisdiction in cases of fraud was soon thereafter expressly conferred upon the courts by the Legislature of the state.

In Blank v. Blank, 107 N. Y. 91, 13 N. E. 615, the action was to set aside a judgment annulling a marriage contract between the parties upon the ground that the plaintiff (the former wife) had been induced, by untrue statements as to the law, to refrain from defending the action. The fraud upon which the action to annul the marriage had been based consisted in the woman's representation that she was a widow, whereas she had been collusively divorced from a former husband, who was still living. In affirming the judgment in favor of the defendant, it was said by Judge Rapallo, in the opinion, that, "whether the marriage between the defendant and the plaintiff was legal or illegal as matter of law, the fraud by which she was charged with having induced the defendant to enter into the contract was sufficient to justify the court in setting it aside, and she does not in any manner attempt to deny that she was guilty of the fraud charged."

Our attention has been called to cases in the courts of this state and of other states which seem to hold a different doctrine upon the subject of the judicial annulment of a marriage contract. Whatever may be said in explanation or in differentiation, I think it is sufficient that we rely upon the plain provision of our statute and

upon the application to the case of a contract of marriage of those salutary and fundamental rules which are applicable to contracts generally when determining their validity. If the plaintiff proves to the satisfaction of the court that through misrepresentation of some fact which was an essential element in the giving of his consent to the contract of marriage, and which was of such a nature as to deceive an ordinarily prudent person, he has been victimized, the court is empowered to annul the marriage. Such was the judgment of the trial court upon the facts in this case, and I think that the learned justices of the Appellate Division, who concurred in reversing that judgment, were in error in holding that the law of this state afforded no remedy to the plaintiff.

The order appealed from should be reversed, and the judgment entered upon the findings of the Special Term should be affirmed, with costs to the plaintiff in the Appellate Division and in this court.

PARKER, C. J., and BARTLETT, HAIGHT, MARTIN, CULLEN, and WERNER, JJ., concur.

Order reversed, etc.[53]

(b) DURESS OR MISTAKE

FORD (falsely called STIER) v. STIER.

(High Court of Justice. [1896] Prob. Div. 1.)

Petition of Ella Louise Ford for a declaration of the nullity of the marriage solemnized between her and the respondent William Douglas Somerset Keppel Stier. The case was tried by Gorell Barnes, J., without a jury. The respondent did not appear.

GORELL BARNES, J. This case is a very remarkable one. The petitioner claims a declaration of the nullity of the marriage solemnized between her and the respondent at St. Mary Abbot's Church, Kensington, on June 5, 1889, on the ground that, owing to the duress to which she was subjected by her mother and the respondent, she was not a free agent in going through the ceremony.

It appears that the respondent had never spoken of marriage to the petitioner, or professed affection for her. She had met him only a few times. She was a girl of seventeen, inexperienced, of a nervous

[53] Cf. Glean v. Glean, 70 App. Div. 576, 75 N. Y. Supp. 622 (1902), where it was held no ground for annulling the marriage that a husband concealed from his wife the fact that he had had several children by another woman previous to marriage; Shrady v. Logan, 17 Misc. Rep. 329, 40 N. Y. Supp. 1010 (1896), where it was held to be no ground for annulment for a woman to conceal the fact that she was the mother of a bastard child.

In Scott v. Sebright, 12 Prob. Div. 21 (1886), Budd, J., at page 23 et seq., used language indicating that a marriage may be avoided by the same kind of fraud as would avoid any other contract. But see Moss v. Moss, ante, p. 72.

temperament, and much under the influence of her mother, a woman of strong character. The respondent and the petitioner's brother started for South Africa on June 1. They missed the steamer and returned to London. On June 4 the respondent obtained a marriage license, stating in his affidavit that the petitioner's father had given his consent. The petitioner's father had never heard of the matter, and the respondent misstated his name in the affidavit.

According to the petitioner's statement, on June 5 her mother told her that they were going out for a drive. They drove to St. Mary Abbot's, and there she was induced to go through the ceremony which has led to this suit. She says that she thought it was a betrothal, and objected to going through even that ceremony with the respondent, as she did not know him, but was so much under her mother's influence that she did as she was told. She declares that she said in the respondent's presence that she did not wish to be betrothed to him, and that he said, "Do as your mother tells you." The clergyman who officiated has not been called, but her manner does not seem to have attracted attention. She says that after the service she threw away the ring, and went home, that she has never seen the respondent since, and that the only member of the family who then knew what had happened was her mother. Her mother is now dead.

The petitioner's brother left for South Africa with the respondent on the day of the marriage. He states that on his arrival the respondent told him of the marriage, that he quarrelled with the respondent in consequence, and that on his return he mentioned the matter to no one but his mother, who told him to say nothing about it. The petitioner's father never heard of the marriage till he received the respondent's letter in 1893. He then sent for his daughter, who had in the meantime married Mr. Ford. The solicitor's evidence shews that the statement which she then made was substantially the same as that which she has made in Court.

I have seen the petitioner in the witness-box and am satisfied that she has given her evidence in good faith. Her case is, "I never intended to marry this man; I thought I was being betrothed to him"—certainly it is remarkable that a person of any education should have thought such a thing, but I can only judge by her manner—"and I submitted to be betrothed only because my mother and he forced me to do so." I find that this was so, that she did not consent to marry the respondent, but went through the ceremony as one of betrothal, and in so doing was to such an extent under the influence of her mother and the respondent that she was not a free agent. I therefore pronounce a decree nisi of nullity, with costs against the respondent.[54]

[54] See, also, the following, where it was held that duress was shown: Avakian v. Avakian, 69 N. J. Eq. 89, 60 Atl. 521 (1905), reviewing the American and English cases, and holding that there is no ratification by subsequent

(c) SUBJECT NOTES

(1) Power of a Court of Equity to Annul in Absence of Statute

See, on this point, the following cases: Mattison v. Mattison, 1 Strob. Eq. (S. C.) 387, 47 Am. Dec. 541 (1847); Burtis v. Burtis, Hopk. Ch. (N. Y.) 557 (1825); Anonymous, 24 N. J. Eq. 19 (1873); Waymire v. Spencer, 22 Ohio St. 271 (1872); Lyndon v. Lyndon, 69 Ill. 43 (1873).

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(2) Marriage in Jest

"Mere words, without any intention corresponding to them, will not make a marriage or any other civil contract. But the words are the evidence of such intention, and, if once exchanged, it must be clearly shown that both parties intended and understood that they were not to have effect. In this case the evidence is clear that no marriage was intended by either party; that it was a mere jest, got up in the exuberance of spirits to amuse the company and themselves. If this is so, there is no marriage." McClurg v. Terry, 21 N. J. Eq. 225 (1870). See, also, Reg. v. Millis, 10 Cl. & F. 534, at page 785 (1843), where Lord Campbell said: "Here I must observe how little weight is to be given to what was gravely relied upon at the bar, the prevailing belief among mankind of the necessity of the presence of a priest at a valid marriage, as evinced by novelists and dramatists; for it will be found that these expounders of the law always make a marriage by a sham parson void, contrary to the opinion of Lord Stowell and the canonists; and they gave validity to marriages in masquerades, where the parties were entirely mistaken as to the persons with whom they were united, marriages which would hardly be supported in the Ecclesiastical Court, in a suit of jactitation, or for restitution of conjugal rights." Cf. Lee v. State, 44 Tex. Cr. R. 354, 72 S. W. 1005, 61 L. R. A. 904 (1902), and Barclay v. Commonwealth, 116 Ky. 275, 76 S. W. 4, 25 Ky. Law Rep. 463 (1903), where the marriage was a sham on the part of the man only.

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(3) Annulment of Marriage after Death of One Party

On this point, see Rawson v. Rawson, 156 Mass. 578, 31 N. E. 653 (1892); Medlock v. Merritt, 102 Ga. 212, 29 S. E. 185 (1897).

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cohabitation where the duress is still operative; Marsh v. Whittington, 88 Miss. 400, 40 South. 326 (1906); Scott v. Sebright, 12 Prob. Div. 21 (1886).

And see the following, where no duress was shown: Cooper v. Crane, [1891] Prob. 369; Todd v. Todd, 149 Pa. 60, 24 Atl. 128, 17 L. R. A. 320 (1892); Merrell v. Moore, 47 Tex. Civ. App. 200, 104 S. W. 514 (1907); Meredith v. Meredith, 79 Mo. App. 636 (1899); Collins v. Ryan, 49 La. Ann. 1710, 22 South. 920, 43 L. R. A. 814 (1897).

Whether the use of criminal process for seduction, or civil proceedings based thereon, constitutes duress, see Blankenmiester v. Blankenmiester, 106 Mo. App. 390, 80 S. W. 706 (1904); Ingle v. Ingle (N. J. Eq.) 38 Atl. 953 (1897); Marvin v. Marvin, 52 Ark. 425, 12 S. W. 875, 20 Am. St. Rep. 191 (1890); Smith v. Smith, 51 Mich. 607, 17 N. W. 76 (1883).

In Grand Lodge v. Smith, 89 Miss. 718, 42 South. 89, 119 Am. St. Rep. 719 (1906), it was held in a suit by the pretended widow that a marriage obtained by duress was absolutely void, where it had not been consummated. The prevailing view is that such a marriage is only voidable. See note on this case, discussing the authorities, in 7 Col. Law Rev. 128.

A PROPOSED UNIFORM MARRIAGE LAW [55]

An act relating to and regulating marriage and marriage licenses, and to promote uniformity between the states in reference thereto.

Section I. Be it enacted, etc., That marriage may be validly contracted in this state only after a license has been issued therefor, in the manner following:

1. Before any person authorized by the laws of this state to celebrate marriages (and hereinafter designated as the officiating person), by declaring in the presence of at least two competent witnesses other than such officiating person, that they take each other as husband and wife; or,

2. In accordance with the customs, rules, and regulations of any religious society, denomination, or sect to which either of the parties may belong, by declaring in the presence of at least two competent witnesses, that they take each other as husband and wife.

Sec. II. No persons shall be joined in marriage within this state until a license shall have been obtained for that purpose from the ..... of the ..... in which one of the parties resides: Provided, that if both parties be non-residents of the state, such licenses may be obtained from the ..... of the ..... where the marriage ceremony is to be performed.

Sec. III. Application for a marriage license must be made at least five days before the license shall be issued: Provided, that in cases of emergency, or extraordinary circumstances, the judge of the court having probate jurisdiction may authorize the license to be issued at any time before the expiration of said five days.

Sec. IV. No license shall be issued unless both of the contracting parties shall be identified to the satisfaction of the proper ..... who shall further require of the parties, either separately or together, a statement under oath relative to the legality of the contemplated marriage, the date of same, the names, relationship, if any, age, nationality, color, residence, and occupation of the parties, the names of the parents, guardians, or curators of such as are under the age of legal majority, any prior marriage or marriages of the parties, or either of them, and the manner of the dissolution thereof; and if there be no legal objection thereto, such ..... shall issue a marriage license in the form hereinafter prescribed. Or, the parties

[55] Only the more important sections of the proposed act are here given. The proposed act is reproduced here, not to show what is the law of any one state, but to serve as a basis of class-room discussion and for the purpose of comparison with local statutes and local law. For history, purpose, and scope of the proposed law, see article in 24 Harv. Law Rev. 548, by Ernst Freund.

intending marriage may, either separately or together, appear before any ..... magistrate or justice of the peace of the ..... (whether in this or any other state) wherein either of the contracting parties resides, or of the ..... where the marriage is to be performed, who shall require of them a statement under oath as above provided; and such statement, having been duly subscribed and sworn to, and the parties having been duly identified, shall be forwarded to the proper ..... who, if satisfied after an examination thereof, that the same is in proper legal form, and that no legal objection to the contemplated marriage exists, shall issue a license therefor.

Sec. V. No license shall be issued if either of the contracting parties be under the marriageable age of consent as established by law. If either of the contracting parties be between the marriageable age of consent as established by law, and the age of legal majority, to wit, between ..... years and ..... years, if a male, and between ..... years and ..... years, if a female, no license shall be issued without the consent of his or her parents, guardian, or curator, or of the parent having the actual care, custody, and control of such minor or minors, given before the ..... under oath, or certified under the hand of such parents, guardian or curator, as aforesaid, and properly verified by affidavit before a notary public or other official authorized by law to take affidavits, which certificate shall be filed of record in the office of said ..... and entered by him on the marriage license docket before issuing said license: Provided, that if there be no guardian or curator of either or both of such minors, or if there be no competent person having the actual care, custody, and control of such minor or minors, then the judge of the ..... of the residence of the minor having probate jurisdiction may, after hearing, upon proper cause shown, make an order allowing the marriage of such minor or minors.

Sec. VI. Provides for filing of a petition by any one who thinks parties incompetent to marry.

Secs. VII, VIII, and IX provide for penalties, blank forms, and dockets.

Sec. X. The license shall authorize the marriage ceremony to be performed in any ..... of this state, excepting that, where both parties are non-residents of the state, the ceremony shall be performed only in the ..... in which the license is issued. The license shall be directed "to any person authorized by the law of this state to solemnize marriage," and shall authorize him to solemnize marriage between the parties therein named, at any time not more than one year from and after the date thereof. If the marriage is to be solemnized by the parties without the presence of an officiating person, as provided by paragraph two of section one of this act, the license shall be directed to the parties to the marriage. If either of the parties be not of the age of legal majority, then his or her age shall be stated, and the fact of the consent of his or her parents, guardian,

or curator shall likewise be stated; and if either of said parties shall have been theretofore married, then the number of times he or she shall have been previously married, and the manner in which the prior marriage or marriages was or were dissolved, shall be stated. The officiating person shall satisfy himself that the parties presenting themselves to be married by him are the parties named in the license; and if he knows of any legal impediment to such marriage, he shall refuse to perform the ceremony. The issue of a license shall not be deemed to remove or dispense with any legal disability, impediment or prohibition rendering marriage between the parties illegal, and the license shall contain a statement to that effect.

Secs. XI and XII give the form of marriage licenses.

Sec. XIII. The license shall have appended to it three certificates, numbered to correspond with the license (one marked "original," one marked "duplicate," and one marked "triplicate"), which shall be in form substantially as follows: [The forms are omitted.]

Sec. XIV. The marriage certificates marked "original" and "duplicate," duly signed, shall be given by the officiating person to the persons married by him; and the certificate marked "triplicate" shall be returned by such officiating person, or, in the case of a marriage ceremony performed without an officiating person, then by the parties to the marriage contract, or either of them, to the ..... who issued the license, within thirty days after the date of said marriage.

Sec. XV. The said ..... upon receiving such triplicate certificate, shall immediately enter the same on the docket where the marriage license of said parties is recorded, and place such certificate on file.

Secs. XVI–XXI provide for penalties.

Sec. XXII. A copy of the record of the marriage license, and marriage certificate, certified under the hand of said ..... and the seal of the court, shall be received in all courts of this state as prima facie evidence of such marriage between the parties therein named.

Sec. XXIII. All marriages hereafter contracted in violation of any of the requirements of section I of this act shall be null and void (except as provided in sections XXIV and XXV of this act): Provided, that the parties to any such void marriage may, at any time, validate such marriage by complying with the requirements of this act, and the issue thereof, if any, shall thereupon become legitimate, as provided by section XXVIII of this act.

Sec. XXIV. No marriage hereafter contracted shall be void by reason of want of authority or jurisdiction in the officiating person solemnizing such marriage, if the marriage is in other respects lawful, and is consummated with the full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.

Sec. XXV. No marriage hereafter contracted shall be void either by reason of the license having been issued without the consent of the parents, guardian, or curator of a minor, or by a ..... not having jurisdiction to issue the same, or by reason of any omission, informality, or irregularity of form in the application for the license or in the license itself, or by reason of the incompetency of the witnesses to such marriage, or because the marriage may have been solemnized in a ..... other than the ..... prescribed in section X of this act, or more than one year after the date of the license, if the marriage is in other respects lawful and is consummated with the full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage. Where a marriage has been celebrated in one of the forms provided for in section I of this act, and the parties thereto have immediately thereafter assumed the habit and repute of husband and wife, and have continued the same uninterruptedly thereafter for the period of one year, or until the death of either of them, it shall not be lawful to prove that a license has not been issued as required by this act.

Sec. XXVI. Omitted from revised draft.

Sec. XXVII. If a person during the lifetime of a husband or wife with whom the marriage is in force, enters into a subsequent marriage contract in accordance with the provisions of section I of this act, and the parties thereto live together thereafter as husband and wife, and such subsequent marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, or that the former marriage had been annulled or dissolved by a divorce, or without knowledge of such former marriage, they shall, after the impediment to their marriage has been removed by the death, or divorce of the other party to such former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and after the removal of such impediment, and the issue of such subsequent marriage shall be considered as the legitimate issue of both parents.

Sec. XXVIII provides for legitimation of illegitimate children.

Sec. XXIX provides for annual statement to be made to a central state authority.

Sec. XXX. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Sec. XXXI. Provides for fees.

Sec. XXXII. Repealing clause.

CHAPTER II

DIVORCE AND SEPARATION

SECTION 1.—DIVORCE OR JUDICIAL SEPARATION [1]

I. Jurisdiction

HURD'S ILLINOIS REV. ST. 1909, c. 40, § 2: "No person shall be entitled to a divorce in pursuance of the provisions of this act, who has not resided in the state one whole year next before filing his or her bill or petition, unless the offense or injury complained of was committed within this state, or whilst one or both of the parties resided in this state." [2]

NEW YORK CODE OF CIVIL PROCEDURE, § 1756: "In either of the following cases, a husband or a wife may maintain an action against the other party to the marriage to procure a judgment divorcing the parties and dissolving the marriage by reason of the defendant's adultery: 1. Where both parties were residents of this state when the offense was committed. 2. Where the parties were married within this state. 3. Where the plaintiff was a resident of the state when the offense was committed, and is a resident thereof when the action is commenced. 4. Where the offense was committed within the state, and the injured party, when the action is commenced, is a resident of the state."

REVISED LAWS OF MASSACHUSETTS, c. 152, "Of Divorce": "Sec. 4. A divorce shall not, except as provided in the following section, be decreed if the parties have never lived together as husband and wife in this commonwealth; nor for a cause which occurred in another state or country, unless before such cause occurred the parties had lived together as husband and wife

[1] For a discussion of existing statutes on divorce and proposed reforms, see an article entitled "Proposed Reforms in Marriage and Divorce Laws," by Amasa M. Eaton, in 4 Col. Law Rev. 243 (1904). For early history, see II Poll. and Mait. Hist. of Eng. Law (2d Ed.) 366, 392–396, and 1 Bl. Com. 440–442.

[2] For construction of this section, see Way v. Way, 64 Ill. 406 (1872).

in this commonwealth, and one of them lived in this commonwealth at the time when the cause occurred.

"Sec. 5. If the libellant has lived in the commonwealth for five years last preceding the filing of the libel, or if the parties were inhabitants of this commonwealth at the time of their marriage and the libellant has lived in this commonwealth for three years last preceding such filing, a divorce may be decreed for any cause allowed by law, whether it occurred in this commonwealth or elsewhere, unless it appears that the libellant has removed into this commonwealth for the purpose of obtaining a divorce."

BURTIS v. BURTIS.

(Court of Chancery of New York, 1825. Hopk. Ch. 557, 14 Am. Dec. 563.)

This bill was filed by a wife against her husband. It stated the marriage of the parties; that after the marriage the complainant found, that the defendant was totally impotent; and that he had been so, from his birth. After stating a clear case of corporal impotence, on the part of the husband, with details, which are here omitted, the bill prayed a discovery from the defendant, in answer to the allegations of the complainant, and that the marriage might be dissolved.

The defendant demurred to the bill, objecting, that the complainant is not entitled to any relief; that the defendant ought not to be compelled to make any discovery; and that the complainant as the wife of the defendant, can not sue, otherwise than by her next friend.

THE CHANCELLOR.[3] When New York became a province of England, it was for some years ruled by a governor or a governor and council; and during that period, the governor, either alone or in conjunction with the council, seems to have exercised all magistracy, executive, legislative and judicial. During that period, one of the governors, Lovelace, granted four divorces; of which, one was in 1670, and the other three in 1672. These are the only instances of divorce, which appear to have taken place in the colony, during the long period in which New York was a province of England. In 1683, the people were admitted to a participation of the legislative power; and from that time laws were enacted by the colonial legislature. The colony never had any court possessing jurisdiction of matrimonial causes, or power to grant divorces. No statute defining causes of divorce, or authorizing divorce, in any case whatever, was ever enacted by the legislature of the colony. Some special applications for divorces were made to the colonial legislature;

[3] Part of the opinion is omitted.

but all such applications were refused. The governor of the colony, with the consent of the council, had power to establish courts of justice; and all the courts of the colony derived their origin from this source of authority. But no court having cognizance of matrimonial causes or divorces, was ever established in the colony; no court of the colony exercised any such jurisdiction; and no law concerning divorce was ever enacted by the colonial legislature. The four divorces granted by Governor Lovelace must be regarded as extraordinary acts of power, by a chief magistrate who possessed very great and indefinite authority; they were the acts of one governor; they stand alone in the history and practice of the English colony; and they afford no proof of any law of the colony authorizing divorces. According to all the information which I can obtain from records or otherwise, it appears that no divorce took place in the colony of New York during more than one hundred years preceding the time when the colony became a state; and that the only divorces which ever took place in the colony were the four granted by Governor Lovelace, in 1670 and 1672. Thus it appears that the law of England concerning divorces and matrimonial causes, was never adopted in the colony of New York. It was not adopted in fact or in practice, and it was never the law of the colony. * * *

During more than ten years after the colony became a state, there was no law authorizing a divorce, in any case whatever. On the thirtieth day of March, 1787, the legislature passed a statute, entitled an "act directing a mode of trial, and allowing of divorces in cases of adultery." The preamble of this law was expressed in the following terms: "Whereas the laws at present in being within this state, respecting adultery, are very defective, and applications have, in consequence, been made to the legislature, praying their interposition; and whereas it is thought more advisable for the legislature to make some general provision in such cases, than to afford relief to individuals, upon their partial representations, without a just and constitutional trial of the facts." This was the first law in this state, authorizing a divorce; and it was confined to the case of adultery. It continued to be the only law, until the ninth day of April, 1813, when the legislature made a new and extensive provision for divorces. By the statute then enacted, the wife may obtain a divorce from her husband, where he has been guilty of cruel and inhuman treatment towards her, or such conduct as renders it unsafe and improper that she should cohabit with him; or where he has abandoned her and neglects to provide for her. The provisions last mentioned, were by a statute of the tenth day of April, 1824, extended to husbands against their wives.

Such is the history of our own law concerning divorces; and its actual state is found in these statutes now in force. I cannot admit, that we have another code, on the same subject; and that the laws

of England concerning divorces, are also, laws of this state. The English law concerning divorces and causes of divorce, as it exists now, and as it existed while this state was a colony, is chiefly, the ecclesiastical law, and not the common law of that country. It is administered by judges and courts, whose jurisdiction has never existed, either in the state or the colony of New York; and it was evidently regarded by our ancestors of the colony and the state, as no part of the common law, which they adopted.

Our statutes are clearly, original regulations, intended to authorize divorces in cases, in which no divorce could before be obtained. They define the causes for which divorces shall be granted; they give jurisdiction of those cases to this court; and they give no other jurisdiction. The specified cases are with some differences, causes of divorce by the laws of England; but these statutes are evidently, founded on the supposition, that the causes of divorce which they define, were not causes of divorce, by any pre-existing law in force in this state. To consider these statutes as an adoption of the English law of divorces, would be a violent perversion of the language and intention of the legislature. Such a construction of these laws, would in effect, declare, that statutes authorizing divorces, in certain cases particularly specified, also authorize divorces, in a multitude of other cases not specified. Had the legislature considered the English law of divorces, as the law of this state, they would probably have authorized some tribunal to administer that law; but they have conferred no such authority; and they have cautiously, limited and regulated the power of divorce, as an innovation upon the pre-existing law of the state. If the power to divorce for one cause, could imply a power to divorce for a different cause, the statute of 1787, authorizing divorces, for adultery, might have authorized divorces for cruel treatment or desertion; and the subsequent statutes, would have been unnecessary. But the legislature entertaining no such opinion, have advanced by successive steps, and have authorized divorces, not by adopting or recognizing any foreign law, but by their own acts of legislation. The causes of divorce and the jurisdiction of this court, are equally prescribed by these statutes; the jurisdiction is given in the defined cases; and these laws confer no jurisdiction or authority to divorce, in any other case. In every view of these acts of our legislature, they are substantive laws, authorizing divorces in the cases which they specify, and not authorizing divorce, in any other case, or for any other cause. * * *

The cause for which this court is now asked to dissolve a marriage, is corporal impotence, on the part of the husband. This fact is not a cause of divorce, by our statutes; and it is impossible to yield to this suit, without adopting the law of England or some other country, concerning divorces, as the law of this state. If a divorce can be granted for this cause, the whole catalogue of causes

allowed by the laws of England, may be equally adopted; the acts of the legislature and the policy of the state, respecting divorces, would be superceded by the doctrines of a foreign code; and a power hitherto unknown in this state, would be exercised. The corporal impotence of the husband, is a cause of divorce in England, and by the laws of most countries; but is not a cause of divorce, by the laws of this state. This suit must therefore, be dismissed.

The suit was accordingly dismissed, but without costs.[4]

DITSON v. DITSON.

(Supreme Court of Rhode Island, 1856. 4 R. I. 87.)

Petition for divorce. The petitioner married George L. Ditson in the city of New York, in October, 1842. After the marriage Mr. and Mrs. Ditson lived in Europe and Cuba, and then returned to America. Defendant deserted the petitioner in Boston. Upon being thus deserted the petitioner came to live with her father at Little Compton, R. I. Ditson had been absent, at the time of the filing of the petition for more than three years, during all of which time petitioner had lived in Little Compton, with the exception of three months spent in Newport, R. I. It was admitted that Ditson had never been domiciled in R. I., or even, to the knowledge of any witness, been within the state. No personal notice of the application for divorce had been given him, and none attempted to be given, since his place of residence was wholly unknown to the petitioner. The petition was filed in the clerk's office of the Supreme Court for the County of Newport, on the 9th day of July, 1856; and the clerk certified that he had given six weeks notice of the application by publication.

The court being satisfied that the petitioner had shown cause for divorce, intimated a doubt concerning the jurisdiction of the court over the cause and desired counsel for the petitioner to present authorities to the court upon that point.[5]

AMES, C. J. * * * The question raised by the case at bar, and for the decision of which in the affirmative this court is said by the supreme court of Massachusetts in Lyon v. Lyon, 2 Gray, 367, to have pronounced a decree in favor of Mrs. Lyon void upon general

[4] See, also, to the effect that in the United States courts have jurisdiction to grant divorce only when such jurisdiction has been expressly conferred upon them by statute, Anonymous, 24 N. J. Eq. 19 (1873); Irwin v. Irwin, 3 Okl. 186, 41 Pac. 369 (1895); Cizek v. Cizek, 76 Neb. 797, 107 N. W. 1012 (1906); Rumping v. Rumping, 36 Mont. 39, 91 Pac. 1057, 12 L. R. A. (N. S.) 1197, 12 Ann. Cas. 1090 (1907).

See, also, note to Rumping v. Rumping, supra, in 12 L. R. A. (N. S.) 1197, on the "Necessity of Alleging Jurisdictional Residence in Divorce Proceedings."

[5] The above short statement of facts is substituted for that in the report. Only part of the opinion is given.

principles of law, is, whether the bona fide domiciliation of the petitioning party in this state is sufficient to give this court jurisdiction to grant a divorce a vinculo, although the other party to the marriage to be dissolved has never been subject to our jurisdiction, never been personally served with notice of the petition within the state, or appeared and answered to the petition, upon constructive notice, or upon being served with personal notice of it out of the state? In other words, the question is, whether, as a matter of general law, a valid decree of divorce a vinculo can be passed in favor of a domiciled citizen of the state, upon mere constructive notice to the foreign or non-resident party to the marriage, against whom, or to dissolve whose marital rights over or upon the petitioner, the aid of the court is invoked? * * *

It is undoubtedly true, as a common-law principle, applicable to the judgments of its courts, that they bind only parties to them, or persons in such relation to the parties and to the subject of the judgment, as to be deemed privies to it. The rule of this system of jurisprudence, which brings privies within the operation of the notice served upon the principals to a judgment and binds them by its effects, is founded upon quite as clear a policy, and is sanctioned by quite as complete justice, as that which renders the judgment obligatory upon those whom they represent. It is founded upon the great policy ut sit finis litium, and upon the necessity, to carry out this policy, that the future and contingent representatives of the parties in relation to the subject of the judgment should be bound by it. Again, there is no system of jurisprudence, which, founded as the jurisdiction of the court is upon the personal service of the subpœna, is more special in its requisition that all parties interested should be served in the suit, in order to be bound by the decree, than that administered by the English chancery; yet even in this court, from the same policy, and upon the same necessity, the first tenant in tail, or the first person entitled to the inheritance, if there be no tenant in tail, living, or even the tenant for life, as the only representative to be found of the whole inheritance, by his appearance to the suit binds to the decree in it all those subsequently and contingently interested in the estate; the court, in administering this rule of representation of parties, taking care only that the representative be one whose interest in the subject of the suit is such as to insure his giving a fair trial to the question in contestation, the decision of which is to affect those who remotely or contingently take after him. Again, there is the large class of proceedings in rem, or quasi in rem, known especially to courts administering public or general law, and borrowed from thence into every system of jurisprudence, in which, the jurisdiction being founded upon the possession of the thing, the decree binds all interested in it, whether within or without the jurisdiction of the

nation setting up the court, and whether personally or constructively notified of the institution or currency of the proceeding.

This, too, is founded upon a necessity of high expediency, since, without it, a prize or instance court, for example, could not, so scattered or concealed are the parties interested, perform any of the functions for which, by the general or public law, it is set up. Proceedings of this nature must, we think, be familiar to the courts of Massachusetts; and probably not a day passes in which things within their jurisdiction are not, by direct attachment or garnishee process, seized, attached, condemned, and sold under their judgments, without other than constructive notice to the non-resident owners of them, in order that these courts may do justice to their own citizens, or even to alien friends, properly applying to them for relief. Here, too, necessity requires the courts to dispense with personal notice, in order to give effect to their judicial orders; since otherwise, the state might be full of the property of non-residents and aliens, applicable to all purposes except the commanding ones of justice. Without doubt, in these and other like cases, the general law in dispensing with personal notice from necessity, requires some fair approximation to it, by representation, substitution, or at least such publicity, as under the circumstances, is proper and possible, or the proceeding will be regarded as a fraud upon the rights of the absent and unprotected,—a robbery under the forms of law, and so a fraud upon law itself. It is, however, a very narrow view of the general law, it is to form a very low estimate of the wisdom which directs its administration, to suppose, that when it can do justice to those within its jurisdiction and entitled to its aid only by dispensing with personal notice to those out of it, and substituting instead what is possible for notice to them, it is powerless to do this, and so, powerless to help its own citizens or strangers within its gates, however strong may be their claims or their necessities. Such a sacrifice of substance to shadows, of the purposes to the forms of justice, might mark the ordinances of a petty municipality, but could hardly be supposed to characterize the system of general law.

Now, marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. In strictness though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these, uncontrollable by any contract which they can make. When formed, this relation is no more a contract than "fatherhood" or "sonship" is a contract. It is no more a contract than serfdom, slavery, or apprenticeship are contracts, the latter of which it resembles in this, that it is formed by contract. To this relation there are two parties, as to the others, two or more, interested without doubt in the existence of the relation, and so interested in its dis-

solution. These parties are placed by the relation in a certain relative state or condition, under the law, as are parents and children, masters and servants; and as every nation and state has an exclusive sovereignty and jurisdiction within its own territory, so it has exclusively the right to determine the domestic and social condition of the persons domiciled within that territory. It may, except so far as checked by constitution or treaty, create by law new rights in, or impose new duties upon, the parties to these relations, or lessen both rights and duties, or abrogate them, and so the legal obligation of the relation which involves them, altogether.

This it may do, with the exception above stated, as to some relations, by law, when it wills; declaring that the legal relation, of master and slave, for instance, shall cease to exist within its jurisdiction, or for what causes or breaches of duty in the relation, this, or the legal relation of husband and wife, or of parent and child, may be restricted in their rights and duties or altogether dissolved through the judicial intervention of its courts. The right to govern and control persons and things within the state, supposes the right, in a just and proper manner, to fix or alter the status of the one, and to regulate and control the disposition of the other; nor, is this sovereign power over persons and things lawfully domiciled and placed within the jurisdiction of the state diminished by the fact that there are other parties interested through some relation, in the status of these persons, or by some claim or right, in those things, who is out of the jurisdiction, and cannot be reached by its process. No one doubts this, as a matter of general law, with regard to the other domestic relations, and what special reason is there to doubt it, as to the relation of husband and wife? The slave who flees from Virginia to Canada—no treaty obliging his restoration—or who is brought by his master thence to a free state of the Union—no constitutional provision enforcing his return—finds his status before the law in the new jurisdiction he has entered, changed at once; and no one dreams that this result of a new domicil and the new laws of it, is less legally certain and proper as a matter of general law, because the master is out of the new jurisdiction of his slave, and is not, or cannot be cited to appear and attend to some formal ceremony of emancipation. It is true that slavery is a partial and peculiar institution, not generally recognized by the policy of civilized nations; whereas marriage, in some form, is coextensive with the race, and, as a relation, is nowhere so restrictive and so binding in its obligations as amongst the most truly civilized portions of it.

Yet each nation and state has its peculiar law and policy as to the mode of forming, and the mode and causes for judicially dissolving this last relation, according to its right; and all that other states or nations, under the general law which pervades all Christendom, can properly demand is, that in the exercise of its clear right in this last respect as to its own citizens or subjects, it should pay

all, and no more attention, than is practicable to the competing rights and interests of their citizens and subjects. It should give to non-residents and foreigners, parties to such a relation of general legal sanctity, as to persons of the like description interested in property within its territory, the rights to which are also everywhere recognized, at least such notice by publicity before it proceeds to judicial action, as can, under such circumstances, be given consistently with any judicial action at all, efficient for the purposes of justice. To say that the general law inexorably demands personal notice in order to such action, or, still worse, demands that all parties interested in a relation or in property subject to a jurisdiction should be physically within that jurisdiction, is to lay down a rule of law incapable of execution, or to make the execution of laws dependent not upon the claims of justice, but upon the chance locality, or, what is worse, upon the will of those most interested to defeat it.

It is very evident, upon examining the statutes of the different states of the Union, that legislation vesting jurisdiction for divorce in their courts has followed no principle of general law in this respect whatsoever; some statutes making the jurisdiction, or supposing it, to depend upon the place of the contract, some upon the place of the delictum, and some, as in this state, and as they should do, upon the domicil of the wronged and petitioning party. The courts of each state exercise, as they must, jurisdiction upon the principles laid down for them by statute; and have very little occasion, unless called upon to review the decree of some neighboring state, to attend to or consider any general principles pertaining to the subject. Engaged in this latter task, they are very apt to confound the statute principles of jurisdiction, to which they are accustomed, with the principles of general law relating to it; notwithstanding the latter so obviously grow out of the right of every state to regulate, in some cases by law, and in others by proper judicial action, according to the nature of the subject, the social condition, or status, as it is called, of all persons subject to its jurisdiction.

A singular instance of forgetfulness of this principle of "state sovereignty" is afforded by the case of Hull v. Hull, 2 Strob. Eq. (S. C.) 174, in which the right of the state of Connecticut to dissolve through its courts under the law of that state, a marriage there formed between two of its own citizens, upon the petition of a wife whose husband had deserted her and her children and settled in South Carolina, constructive notice only having been given to the absent and absconding husband, was put upon the ground that dissolution of the contract of marriage upon such notice was part of the law of the place of the contract and so part of the contract itself. The courts of that state, it seems, whilst forgetting the state rights of their northern sister, strenuously insist upon the rights of their own; holding, according to the exploded notion of Lolley's Case, or rather of McArthy v. McArthy, that a South Carolina marriage can-

not be dissolved out of the state of South Carolina, although any other may. In Irby v. Wilson, 21 N. C. 568, 576, under similar circumstances, except that in this case the wife was the deserting and the husband the petitioning party, the supreme court of North Carolina held that a Tennessee divorce was void, upon the ground hinted at in Lyon v. Lyon, supra, to wit, that such a proceeding being between parties, and the wife having been constructively notified only, although such notice was all that was possible, the courts of Tennessee could not alter by way of redress the status of one of its own citizens, become burdensome to him by the alleged causeless and continued desertion of his wife. Upon the same principle, and for the same reason, of course, North Carolina could not relieve from the relation, its citizen, the wife, although her husband might have compelled her to flee from him to the only home open to her in that state, by the grossest violation of the duties which their relation to each other imposed; and thus, both these conterminous sovereignties would be powerless for justice, over and upon the call of its respective domiciled inhabitant. In Pennsylvania, the jurisdiction is made to depend upon jurisdiction over the offender at the time of the offence, (Dorsey v. Dorsey, 7 Watts, 349, 32 Am. Dec. 767) as if the lex loci delicti were to govern; in Louisiana, upon like jurisdiction, unless the marriage were contracted within the state, when we suppose the delictum would be regarded as a breach of contract, if such by the law of Louisiana in which the contract was entered into. Edwards v. Green, 9 La. Ann. 317.

Thus, we perceive, that by some courts marriage is treated as a species of continuing executory contract between the parties, the obligations of which, and the causes and even modes of dissolving which, are fixed by the law of the place of contract. So sacredly local is it, in the view of some, that it cannot be dissolved but by the courts of the country in which it was formed. Others, perceiving, that though a contract, it is one universally recognized, acknowledge the right of foreign tribunals to act upon it, provided that in doing so, they govern themselves not by the only law which they, it may be by statute, can administer, but ascertain whether it has been broken, and so ought to be dissolved, by the law of the place of the contract. Some treat breaches of the contract of every degree as quasi crimes, to be punished only in the place in which they were committed, provided the parties be then there domiciled; and others, again, qualify this, by an exception in favor of the tribunals of the place of contract; since there the delicta can be treated as breaches of the contract, if such be the law of the place of contract. If marriage be a contract, or the breach of it a tort, it may well be asked, why are they not at least personal in their nature, and transitory in their legal character? passing with the wronged person wherever he or she passes, for redress by any tribunal of the civilized world, which can obtain jurisdiction of the person of the covenant breaker or trespasser?

It is evident that from such confusion of decisions and reasons, no general principle worth considering can, by any process, be eliminated. Raising ourselves above this mist of misapplied learning and ingenuity, and looking at the matter simply as it is, it is obvious, that marriage, as a domestic relation, emerged from the contract which created it, is known and recognized as such throughout the civilized world; that it gives rights, and imposes duties and restrictions upon the parties to it, affecting their social and moral condition, of the measure of which every civilized state, and certainly every state of this Union, is the sole judge so far as its own citizens or subjects are concerned, and should be so deemed by other civilized, and especially sister, states; that a state cannot be deprived, directly or indirectly, of its sovereign power to regulate the status of its own domiciled subjects and citizens, by the fact that the subjects and citizens of other states, as related to them are interested in that status, and in such a matter has a right, under the general law, judicially to deal with and modify or dissolve this relation, binding both parties to it by the decree, by virtue of its inherent power over its own citizens and subjects, and to enable it to answer their obligatory demands for justice; and finally, that in the exercise of this judicial power, and in order to the validity of a decree of divorce, whether a mensa et thoro or a vinculo matrimonii, the general law does not deprive a state of its proper jurisdiction over the condition of its own citizens, because non-residents, foreigners, or domiciled inhabitants of other states have not or will not become, and cannot be made to become, personally subject to the jurisdiction of its courts; but upon the most familiar principles, and as illustrated by the most familiar analogies of general law, its courts may and can act conclusively in such a matter upon the rights and interests of such persons, giving to them such notice, actual or constructive, as the nature of the case admits of, and the practice of courts in similar cases sanctions; the purposes of such notice being to banish the idea of secrecy and fraud in the proceeding by inviting publicity to it, as well as to give to persons out of the jurisdiction of the court, every chance possible, under the circumstances, of appearing to the proceeding, and defending, if they will, their own rights and interests involved in it.

These views are supported by the practice of the states of Connecticut and Tennessee called in question, as we have seen, by the courts of South and North Carolina, as probably by the practice of many other states, and certainly by the long continued practice of our own. They are sanctioned by the well-considered decision of Harding v. Alden, 9 Greenl. (Me.) 140, 23 Am. Dec. 549, and by that learned jurisconsult, the late Chancellor Kent, in his note on that case, 2 Kent's Com. 110, n. b., 4th Ed. They are otherwise best sustained by authority. Tolen v. Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742; Guembell v. Guembell, Wright (Ohio) 226; Cooper v. Cooper, 7 Ohio, 238, pt. 2; Mansfield v. McIntyre, 10 Ohio, 27; Harrison v. Harri-

son, 19 Ala. 499; Hare v. Hare, 10 Tex. 355. See also the whole subject discussed in Bishop on Marriage and Divorce, passim, and especially in chapter 34 of that valuable work.

It may be added, that the distressing consequences which otherwise might arise from the conflict of laws and decisions upon this interesting and important subject have been wisely provided against, by a clause of the constitution of the United States, and can find a remedy under it in the supreme court of the United States, as the court of last resort, in cases demanding its application. By article 4, § 1, of the constitution of the United States, "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." As this has been construed by the highest authority to give in every other state the same effect to a judgment or decree of a state court that it has in that in which it is rendered or passed, no serious injury can be done to the proper subjects of our judicial administration by the errors and mistakes of other courts with regard to our jurisdiction. From the nature of the topics constantly agitated before it, no court in the world is better qualified to deal with questions of general law, and especially with one involving, as that before us does, the rights of a state of the union; and under the trained qualifications of the members of the court, as well as the constitutional power of the court itself, those properly subject to our judgments and decrees in this respect, as in all others, are quite safe, having honestly obtained them, in acting by virtue of them.

Although, as a general doctrine, the domicil of the husband is, by law, that of the wife; yet when he commits an offence, or is guilty of such dereliction of duty in the relation as entitles her to have it either partially or totally dissolved, she not only may, but must, to avoid condonation, establish a separate domicil of her own. This she may establish, nay, when deserted or compelled to leave her husband, necessity frequently compels her to establish, in a different judicial or state jurisdiction than that of her husband, according to the residence of her family or friends. Under such circumstances she gains, and is entitled to gain, for the purposes of jurisdiction, a domicil of her own; and especially, if a native of the state to which she flies for refuge is, upon familiar principles, readily redintegrated in her old domicil. This is the well-settled doctrine of law upon the subject (Bishop on Marriage and Divorce, §§ 728–730, incl., and cases cited), and has by no court been more ably vindicated than by the supreme court of Massachusetts (Harteau v. Harteau, 14 Pick. [Mass.] 181, 185, 25 Am. Dec. 372).

A more proper case for the application in favor of a petitioner for divorce of the foregoing principles relating to the jurisdiction of the court over her case, and to the question of her domicil in this state, can hardly be imagined, than the case at bar. The petitioner is the daughter of a native of this state, who, though formerly resident in Boston, has for many years past been domiciled in his native place.

Little Compton. Whilst at school, the petitioner became acquainted with an Englishman of the name of Ditson, and, in 1842, married him, without the knowledge or consent of her parents, in New York. Immediately after marriage the couple went to Europe, and from thence to Cuba, where they lived together several years. Upon their return to this country, she being in a feeble and emaciated condition, he deserted her for the first time in Boston, and was absent in Europe, without leaving any provision for her, for about two years. Upon his return, they appear to have lived together again; he, however, giving every indication of a morose as well as inattentive husband. After a short time, he deserted her again in Boston, declaring, upon his leaving it for Europe that he cared nothing about it, or any person in it, pointing, as the testimony is put to us, to his unfortunate wife. He has been absent from her now between three and four years, without communicating with her, or providing, though of sufficient ability, anything for her support, nor does she know where he is, except that he has gone to Europe. In the meantime, deserted as she was, she was obliged to return to her father's house in Little Compton; where, during this time, supported by him or by her own exertions, she has resided, with the exception of about three months passed by her in Newport, Rhode Island. For this desertion and neglect to provide for her, the proof, ex parte it is true, but coming from respectable sources, finds no excuse in her conduct, which, according to it, has always, so far as known, been that of a dutiful and faithful wife.

We reserved this case, the first on the circuit which presented the question before discussed for consideration, it being admitted that the husband of the petitioner had never resided with her in this state, or even as the proof showed, been within its borders, and was now abroad in parts unknown, and was not, of course, personally served, because under such circumstances he could not be personally served with the ordinary citation issued by us to a resident defendant to such a petition. Under the authorized rule of this court, in regard to constructive notice to an absent defendant to a petition for divorce, upon affidavit of the facts, six weeks' notice of the pendency of this petition was given, by publishing the same for the space of six weeks next before the sitting of the court at this term; and it is evident that the husband of this lady knows, as from his conduct it is apparent that he cares, nothing about this proceeding. Whatever was the former domicil of the petitioner, we are satisfied that she is, and has, for upwards of the last three years, been a domiciled citizen of Rhode Island,—her only home, in the house of her father; and that, as such citizen, and upon such notice, we have power and jurisdiction over her case, and to change her condition from that of a married to that of a single woman, granting to her the relief, which, under like circumstances, the law and policy of Rhode Island accords to all its citizens. Let a decree be entered divorcing Mary Ann Ditson from George L. Ditson, and annulling the bond of matrimony now sub-

sisting between them; and that the name of the said Mary Ann Ditson be changed to, and she be hereafter known and called by the name of Mary Ann Simmons, according to the prayer of her petition.[6]

II. Grounds for Granting Divorce

REV. LAWS MASS. 1902, c. 152: "Section 1. A divorce from the bond of matrimony may be decreed for adultery, impotency, utter desertion, continued for three consecutive years next prior to the filing of the libel, gross and confirmed habits of intoxication caused by the voluntary and excessive use of intoxicating liquor, opium or other drugs, cruel and abusive treatment or, on the libel of the wife, if the husband, being of sufficient ability, grossly or wantonly and cruelly refuses or neglects to provide suitable maintenance for her.

"Sec. 2. A divorce may also be decreed if either party has been sentenced to confinement at hard labor for life or for five years or more in the state prison or in a jail or house of correction; and, after a divorce for such cause, no pardon granted to the party so sentenced shall restore such party to his or her conjugal rights."

HURD'S ILL. REV. ST. 1909, c. 40: "Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, that in every case in which a marriage has been, or hereafter may be contracted and solemnized between any two persons, and it shall be adjudged, in the manner hereinafter provided, that either party at the time of such marriage was, and continues to be naturally impotent; or that he or she had a wife or husband living at the time of such marriage; or that either party has committed adultery sub-

[6] The principal case has been generally followed in the United States upon both of the main points involved.

It has not been deemed expedient to cover in detail in this casebook points of conflict of laws, relating either to marriage or divorce. For a collection of cases on conflict of laws relative to divorce, the student is referred to Lorenzen's Cases on Conflict of Laws in the American Casebook Series at pages 536–565. The following cases, illustrative of this branch of the law, are there reported: Le Mesurier v. Le Mesurier, L. R. App. Cas. 517 (1895); Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366 (1903); Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794 (1901); Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1 (1906). Or see 1 Beale, Cases on Conflict of Laws, pp. 388–432. See, also, the following articles: "Constitutional Protection of Decrees for Divorce," by J. H. Beale, Jr., in 19 Harv. Law Rev. 586; "The Doctrine of Haddock v. Haddock," by Henry Schofield, in 1 Ill. Law Rev. 219; "Two Recent Cases on Interstate Marital Relations," by H. A. Bigelow, in 18 Green Bag, 348. And see notes on Haddock v. Haddock, supra, in 6 Col. Law Rev. 449, 40 Am. Law Rev. 580, 4 Mich. Law Rev. 534, and 22 Law Quar. Rev. 237. On the effect of a statute forbidding the remarriage of the guilty party, see notes in 22 Harv. Law Rev. 302, 24 L. R. A. 831, and 57 L. R. A. 169.

sequently to the marriage; or has willfully deserted or absented himself or herself from the husband or wife, without any reasonable cause, for the space of two years; or has been guilty of habitual drunkenness for the space of two years; or has attempted the life of the other by poison or other means showing malice, or has been guilty of extreme and repeated cruelty; or has been convicted of felony or other infamous crime, it shall be lawful for the injured party to obtain a divorce and dissolution of such marriage contract."

(A) Adultery

LEVY v. LEVY.

(Appellate Court of Illinois, First District, 1885. 16 Ill. App. 358.)

WILSON, P. J. This was a bill in chancery, brought by the appellant against the appellee for a divorce, on the ground of adultery. The defendant's default having been entered, the bill was taken pro confesso, and upon an ex parte hearing the bill was dismissed at the costs of the complainant for want of equity.

We have carefully considered the evidence tending to prove the commission by the defendant of the offense charged in the bill, since her marriage with the complainant, and without referring to it in detail, we need only say, that, though mainly circumstantial, it is, in our opinion, sufficient to establish the defendant's guilt.

It appears from the bill of exceptions that, previous to the marriage of the parties, the defendant, to the knowledge of the complainant, was a person of unchaste habits, and that the complainant himself had cohabited with her prior to the marriage, knowing her at the time to be a prostitute, but that he subsequently married her upon her promise to reform. Within a few days after the marriage he discovered that she was unfaithful to her marital obligations, and had committed adultery as charged in the bill.

The court below seems to have entertained the view that having knowingly married an immodest woman, though upon her promise of reformation, the husband cannot complain if she be guilty of adultery after the marriage. In this view we are unable to concur. The statute makes the commission of adultery by either party subsequent to the marriage cause for divorce. No exception or reservation is made in favor of or against any particular class of persons. It provides, "that in every case in which a marriage has been, or may hereafter be contracted and solemnized between any two persons, and it shall be adjudged that either party * * * has committed adultery subsequently to the marriage * * * it shall be lawful for the injured party to obtain a divorce and dissolution of such marriage contract." The language is of general application, and is not to be limited or extended beyond what its terms plainly import. Two years' habitual

drunkenness is also made a statutory cause for divorce, but we think it would hardly be contended that if a woman were to marry an habitual drunkard upon his promise to reform she would be thereby estopped from ever complaining, however much he might offend in that respect subsequently to the marriage. No difference in principle is perceived between such a case and the one in hand.

Aside from the promise of the defendant to reform, the vows at the marriage altar are themselves the most sacred promises that thenceforth, forsaking all others, the parties will lead chaste lives, and be faithful to their marital relations. However mistaken the complainant may have been in believing that, by conferring upon the defendant the honorable condition of wifehood, he would thereby restore her to a life of purity, he had a right to rely upon her promise to be true to him. To hold that when she thereafter was found sinning, the complainant is to be forever tied to a woman lost to every sense of decency and gratitude, and whom he had endeavored to clothe with the garment of respectability by making her his wife, is revolting to our sense of justice, and is not sanctioned by any sound rule of law. In Baylis v. Baylis, Law R. 1 Prob. & Div. 395, it is said: "Whatever the previous life of a woman may have been, she binds herself to chastity, and if she breaks the conditions of marriage, her husband is entitled to claim its dissolution." And in 1 Bishop on Mar. and Div. § 179: "In this country, where divorces a vinculo are granted for adultery, it is of little consequence whether the marriage of an unreformed prostitute, to a person whom she deceives as to her character, is to be deemed void from the beginning or not, since it would be annulled on proof of the subsequent adultery." The principle as thus enunciated we think salutary and just, and it is decisive of the present appeal.

The decree of the court below dismissing the bill will be reversed and the cause remanded, with instructions to enter a decree of divorce according to the prayer of the bill. Judgment accordingly.[7]

PRENDERGAST v. PRENDERGAST.

(Supreme Court of North Carolina, 1907. 146 N. C. 225, 59 S. E. 692.)

Action for divorce a vinculo, tried before Councill, J., and a jury, at September Term, 1907, of the Superior Court of Alamance County.

Plaintiff alleged and offered evidence tending to prove one act of illicit intercourse on the part of the husband, defendant. Without evi-

[7] Accord: Baylis v. Baylis, L. R. 1 Prob. and Div. 395 (1867), semble; Roote v. Roote, 33 App. D. C. 398 (1909).

In a few states statutes make antenuptial unchastity resulting in pregnancy, or even antenuptial unchastity alone, a cause for divorce, where the prior prostitution of the wife was unknown to the husband at the time of marriage. See note to Franke v. Franke (Cal.) in 18 L. R. A. 375 (1892).

dence ultra, the trial Judge thereupon intimated that he would charge the jury that in no aspect of the evidence was the plaintiff entitled to the relief prayed for, in that the laws of North Carolina did not allow a dissolution of the bonds of matrimony for one act of adultery on the part of the husband. Thereupon, plaintiff, having excepted, submitted to a nonsuit and appealed.

HOKE, J., after stating the case. Under Code 1883, § 1285, and for years prior thereto, the causes for absolute divorce in this State were as follows: (1) If either party shall separate from the other and live in adultery. (2) If the wife shall commit adultery. (3) If either party, at the time of the marriage, was and still is naturally impotent. (4) If the wife, at the time of the marriage, be pregnant and the husband be ignorant of the fact of such pregnancy and be not the father of the child with which the wife was pregnant at the time of the marriage. By chapter 499, Laws of 1905, the first clause of the foregoing section was stricken out and there were substituted the words "If the husband shall commit fornication and adultery," making that part of the law, in effect, as follows: That an absolute divorce shall be granted, (a) if the husband shall commit fornication and adultery, and (b) if the wife shall commit adultery.

To adopt the position contended for by the plaintiff would require that these terms should have one and the same meaning, whereas the marked difference in the two clauses, standing as they do in such close juxtaposition, gives clear indication that the Legislature intended to make a distinction between the man and the woman in this feature of our laws of divorce, and we are of opinion that, in allowing a divorce when the man shall "commit fornication and adultery," it was intended to give those terms the distinctive meaning acquired by the words when associated together and as contained in section 3350 of the Revisal, defining the crime of "fornication and adultery." The uniform construction put upon this statute has established that, to constitute fornication and adultery, the misconduct must be habitual, and the General Assembly was no doubt advertent to this construction in making the amendment referred to.

There are grave reasons for the distinction made by this legislation,[8] which the General Assembly evidently regarded as controlling, but, being matters more properly for legislative consideration, they are not specified or dwelt upon here, and are only referred to in a general way in support of the construction we have given the statute. It is argued that this interpretation would leave the amendment without any force or effect on the law as it formerly stood, but a refer-

[8] Brown, J., concurred in the result, but severely criticised the distinction made by the statute. He said in part: "One act of adultery on the part of either party to the marriage is ground for absolute divorce in every state of this Union except North Carolina, Kentucky and Texas (9 Am. and Eng. Enc. p. 746), and no injurious results have followed in those states which have repudiated the fallacy that public policy requires such a discrimination between husband and wife."

ence to the statute will readily indicate the change that was made and intended. Formerly, in order to obtain a divorce for such misconduct on the part of the husband, it was required that he should withdraw from his household and live in adultery, or force the wife to leave him, while this is now no longer required.

We think his Honor correctly interpreted the amendment, and there is no error in his decision.[9]

MATCHIN v. MATCHIN.

(Supreme Court of Pennsylvania, 1847. 6 Pa. 332, 47 Am. Dec. 466.)

This was an appeal by a wife, from a sentence of divorce a vinculo matrimonii, by the Common Pleas of Columbia county. The libel charged adultery, with the usual averments of time and circumstances.[10]

GIBSON, C. J. Though we are bound to determine this appeal on the depositions sent up with the record, they contain enough to warrant a concurrence in the general belief that the appellant was actually insane; for no woman in her senses, however lost to shame, would apprize her husband's kinswoman, by whom her confidence was certain to be betrayed, of an assignation with a paramour. But a wife's insanity, though so absolute as to have effaced from her mind the first lines of conjugal duty, would not be a defence to a libel for adultery, though it would be a defence to an indictment for it. The offence is a social, as well as a moral one; and it is agreed by the civilians to be less grievous to the sufferer, though not less immoral, when it is committed by the husband, whose transgression cannot impose a supposititious offspring on the wife, than it is when committed by the wife, whose transgression may impose such an offspring on the husband; and hence it probably was—though the kindred fault of barrenness was also cause of divorce—that the right of repudiation was confined, in the primitive ages, to the husband; for there is no instance of an exercise of it by a wife till the time of Cicero, or shortly before it. Cooper's notes to Justinian, lib. 1, tit. 9, § 1, p. 435.

A libel for divorce is said to partake of the nature of a criminal proceeding; but the primary intent of it is undoubtedly to keep the sources of generation pure, and when they have been corrupted, the preventive remedy is to be applied without regard to the moral responsibility of the subject of it. It is true, that neither the canon law, nor our own statute, makes any distinction as to sex; but that

[9] In Stewart v. Stewart, 105 Md. 297, 66 Atl. 16 (1907), it was held that, where a statute authorizes divorces a mensa et thoro as well as a vinculo, but adultery is only made ground for divorce a vinculo, a divorce a mensa et thoro cannot be had on the ground of adultery.

[10] The statement of facts is abridged.

the legislation of England, to which the dissolution of marriage in that country exclusively belongs, is guided by an opposite principle, is proved by its readiness to divorce for the adultery of the wife, and its reluctance to divorce for the adultery of the husband. There have been but two instances of the latter; and in each of them, the offence was marked with such circumstances of brutality, that a continuance of the nuptial relation would have reflected the disgrace of the husband on the wife. The distinction is said to be preserved in the laws of many other countries; and though it is not expressly preserved in the application of the remedy under our own, we are nevertheless at liberty to conclude that insanity might be a bar to divorce at the suit of the wife, when it would not, in similar circumstances, be a bar to divorce at the suit of the husband. To say the least, adultery committed under the irresistible impulse of that morbid activity of the sexual propensity which is called nymphomania, or more recently, erotic mania, would certainly be ground of divorce, though not of indictment.

The great end of matrimony is not the comfort and convenience of the immediate parties, though these are necessarily embarked in it; but the procreation of a progeny having a legal title to maintenance by the father; and the reciprocal taking for better, for worse, for richer, for poorer, in sickness and in health, to love and cherish till death, are important, but only modal conditions of the contract, and no more than ancillary to the principal purpose of it. The civil rights created by them may be forfeited by the misconduct of either party; but though the forfeiture can be incurred, so far as the parties themselves are concerned, only by a responsible agent, it follows not that those rights must not give way without it to public policy, and the paramount purposes of the marriage—the procreation and protection of legitimate children, the institution of families, and the creation of natural relations among mankind; from which proceed all the civilization, virtue, and happiness to be found in the world. The absurdity of the dogma, that marriage is a sacrament, and dissoluble only by the head of the church, instead of a political status subject to the power of the state, is manifest.

So far I have treated the subject as if the evidence made out a case of moral insanity, though, in point of legal effect, it does not. Does it prove the corpus delicti?

Were the wife's confession sufficient to prove it, the evidence of it would be ample; for she distinctly acknowledged it before the session of her church; indeed, she seems to have made only a show of persistence in denying it, and to have considered that she had done nothing very wrong. Considering her bringing up, which is admitted to have been of the most careful and exemplary kind, this dullness of the moral sense seems to have been a defect in the constitution of her mind. It is a rule of policy, however, not to found a sentence of divorce on confession alone. Yet, where it is full, confidential, reluc-

tant, free from suspicion of collusion, and corroborated by circumstances, it is ranked with the safest proofs. There is no doubt as to the nature of the rule, or difficulty in its application to the evidence before us. The facts resulting from it are, the wife's disclosure of the assignation to her husband's kinswoman; her absence at the indicated hour; her visit to a neighbour immediately preceding it; her abrupt termination of it, and feigned excuse for going; her presence at the appointed time and place in company with the man she was to meet; the shifting of their ground at the approach of an intruder; the disordered condition of her clothes when she came back; her declaration to her confidant the same evening, and confession to the church session next morning—these, together, make up the sum of plenary proof. To say nothing of the confession of her accomplice, which, not having been communicated to her, and confirmed by her, was not evidence to affect her, there was enough for the purpose of inculpation without the confession of either.

It is a fundamental rule, said Lord Stowell, in Loveden v. Loveden, 2 Haggard, 2, that it is not necessary to prove the direct fact of adultery; for, being committed in secret, it is seldom susceptible of proof except by circumstances which, however, are sufficient whenever they would lead the guarded discretion of a reasonable and just man to a conclusion of guilt. On this principle, a wife's visit with a man to a brothel, or to a man at his lodgings, has been held sufficient proof of it, because it is impossible to assign an innocent motive for such a meeting; nor can an innocent motive be assigned for meeting a man in the dark at a barn-door, in a secluded alley, with the stealthy and shrinking timidity of conscious impropriety. That the preconcerted design was partly put in act, is as convincing evidence of the consummation of it, as would be the testimony of an eye-witness to the fact. There was nothing but the will of the parties themselves to stop them.

We are of opinion, therefore, that the sentence is sustained by legal and sufficient proof. Sentence affirmed.[11]

[11] In Nichols v. Nichols, 31 Vt. 328, 73 Am. Dec. 352 (1858), contra, Redfield, C. J., said: "We have read the case of Matchin v. Matchin, 6 Pa. 332, 47 Am. Dec. 466, and the opinion of the late Chief Justice Gibson, where he attempts to maintain that the adultery of the wife, although insane, is sufficient ground for divorce, for the reason that it tends to impose a spurious offspring upon the husband. The reason is one which will have no application to similar acts committed by the husband, and, as applied to the wife, seems truly revolting to all just sense of propriety and decency. We are surprised that such an opinion should ever have found admission into the reports, and should be shocked at the prospect that it could ever gain general countenance in the American republic."

WRAY v. WRAY.

(Supreme Court of Alabama, 1851. 19 Ala. 522.)

This was a bill for divorce by Albert G. Wray against his wife, Susan M. Wray, on the ground of adultery. The defendant in her answer denies the adultery. She also states that in 1843 she was afflicted with mental derangement, and was totally unconscious, for a period of six months or more, of everything that transpired around her; that since that time she has had frequent attacks of the same malady, and has in fact enjoyed but few lucid intervals; and that while suffering under this derangement she is entirely unconscious, as in the first attack, of everything that transpires.

The chancellor held that the insanity was completely established by the evidence, and that it constituted a good defence. The bill was dismissed, and the complainant is now the plaintiff in error.

PARSONS, J.[12] * * * Taking, as we do, the insanity as established, the question of law arises, whether the complainant is entitled to a decree for a divorce notwithstanding. A really insane person is criminally liable for no act whatever. The law as stated by Lord Lyndhurst, in a homicide case which was before him, is, "that the jury must believe, before they can acquit the prisoner on the ground of insanity, that he did not know when he committed the act, what the effect of it, if fatal, would be, with reference to the crime of murder. The question was, did he know that he was committing an offence against the laws of God and nature." Rex v. Offord, 5 C. & P. 168. It is, however, true, as testified in this cause by one of the physicians of the lunatic asylum in South Carolina, that almost every insane person knows the difference, in the abstract, between right and wrong. In this respect they differ from idiots. But it does not follow that they are capable of acting on or of applying abstract principles to their own conduct. They may not be conscious of violating any law under the imagined circumstances or obligations of duty in which they are placed. They generally reason wrong by supposing facts or obligations of duty which have no real existence.

Had Mrs. Wray been indicted for the adultery, an acquittal would have been inevitable. But it must be conceded that an insane person is civilly liable for his trespasses. I do not doubt that. It is but just that the person whose misfortune has caused an injury to another should bear the loss; and, in the next place, the quo animo in such cases is immaterial. It was held in Massachusetts, that a husband was not entitled to a divorce on the ground that his wife had committed adultery when insane. [Broadstreet v. Broadstreet] 7 Mass. 474. But it was held in Pennsylvania, that the wife's insanity at the time of her adultery was no bar to the husband's libel for a divorce.

[12] The statement of facts is slightly abridged. Part of the opinion is omitted.

[Matchin v. Matchin] 6 Pa. 332 [47 Am. Dec. 466]. I cannot assent to the latter opinion, although it was delivered by Chief Justice Gibson. It is very true, that a legitimate off-spring is one great object of marriage, and that if a sane woman act so as to disappoint her husband's object and expectations in this respect, he is entitled to a divorce. In such case she is responsible for her acts and must abide their consequences. If the reasoning of Mr. Chief Justice Gibson had stopped there, no one could object to it. But if we extend the principle upon which his opinion is chiefly founded to its necessary results, it will be found to be untenable, I think. It would entitle the husband to a divorce, if the wife should become unfruitful from disease, or if another man should gain access to her by force or fraud. In this case advantage was taken of her mental alienation, which can be the cause of no forfeiture of her rights, any more than if a similar advantage had been taken by means of a soporific or of actual force.

As insanity itself is no cause for a divorce, nothing which is a consequence of it can be. The chancellor's decree is affirmed.[13]

(B) Cruelty[14]

MATHEWSON v. MATHEWSON.

(Supreme Court of Vermont, 1908. 81 Vt. 173, 69 Atl. 646, 18 L. R. A. [N. S.] 300.)

Petition for divorce, on the grounds of intolerable severity and refusal to support. Trial at the June Term, 1907, Caledonia County, Miles, J., presiding. Divorce granted for intolerable severity, with an allowance of $1,150 alimony. The petitionee excepted. The opinion states the case.

ROWELL, C. J.[15] A divorce from the bond of matrimony was decreed in this case for "intolerable severity." The treatment found is, in substance, not any personal violence, but that the libellee repeatedly accused his wife of adultery with two certain men, which accusations were sometimes made when he and his wife were alone, sometimes when others were present, especially their adopted son, who was sixteen or seventeen years old, and sometimes to others when his wife was not present, and that he had used harsh and abusive lan-

[13] Accord: Broadstreet v. Broadstreet, 7 Mass. 474 (1811); Mims v. Mims, 33 Ala. 98 (1858); Kretz v. Kretz, 73 N. J. Eq. 246, 67 Atl. 378 (1907). Nor is cruelty, while insane, ground for divorce. McEwen v. McEwen, 10 N. J. Eq. 286 (1854). On desertion, while insane, see Douglass v. Douglass, post, p. 134, and Storrs v. Storrs, post, p. 136.

[14] The student should note the various expressions used in the statutes; e. g., "cruelty," "extreme cruelty," "extreme and repeated cruelty," "cruel and inhuman treatment, whether practiced by using personal violence or other means," "intolerable severity," etc.

[15] Part of the opinion is omitted.

guage to her, and called her vile names. It is found that there was no probable nor reasonable cause for the libellee to believe that his wife was guilty of adultery with either of those men, nor even of improper conduct with one of them, and that his accusations were groundless and false, and occasioned her "much mental suffering"; but that the libellee believed that improper relations existed between his wife and one of those men, and still believed so, but that this belief rested on no other foundation than his jealousy, arising, perhaps, from a certain transaction she had with that man, which, however imprudent on her part, did not justify the libellee's accusation of adultery with him. As to the other man, the court was unable to find that the libellee believed the accusation after he investigated the matter, which he did soon after the time when he claimed the adultery was committed. As to whether the "mental suffering" of the libellant injured her health, or might reasonably be expected to injure it, there is no finding.

The principal question is, whether the facts found make a case of "intolerable severity" within the meaning of those words as used in the statute. The libellee's counsel contend that by the great weight of authority, both English and American, a false charge of adultery, made without reasonable or probable cause, unaccompanied by any act of personal violence, or any apprehension of such act, and unaccompanied by such injury to the feelings as to affect health, or to create a reasonable apprehension that it may affect health, does not constitute legal cruelty. The libellant's counsel say that the words, "intolerable severity," are not found in the divorce laws of any other state; that the language most commonly used is, "cruelty," "extreme cruelty," "cruel and inhuman treatment," and the like; that both courts and elementary writers seem to have found difficulty in giving a satisfactory definition of any of these expressions, and that they are found so coupled with other expressions, held by courts to limit or to extend their meaning, that perhaps no general definition can be given; that some of the earlier decisions held that "extreme cruelty" meant personal violence; but that in more recent years that definition has been discarded as too narrow and limited, and that it is now held that "cruelty," "extreme cruelty," "cruel and inhuman treatment," and the like, may be established by any line of misconduct persisted in by the offending party to such an extent as to cause injury to the life, limb, or health of the other, or to threaten, or to create a danger of such injury; and that it is not regarded as necessary that such injury, present or threatened, should be the direct result of such misconduct, but that it is enough if produced by grief, worry, or mental anguish, occasioned by such misconduct.

We regard this as a substantially correct statement of the law of this subject as at present generally held, both in this country and in England. It accords with Mr. Bishop, when he says that as late as when he wrote the first edition of his "Marriage and Divorce," it

seemed to be the prevailing judicial opinion that mental suffering had nothing to do with bodily ills; at least, that it did not so directly create those ills as to render the infliction of such suffering legal cruelty; but that now, under more enlightened physiological views, the legal doctrine has become settled everywhere, he thinks, that conduct that produces pain of mind is cruelty whenever, operating alone or in combination with something else, it creates a danger to the physical health. 1 Bish. Mar. Div. & Sep. § 1563. And in section 1565 he says that this doctrine, having been affirmed in this country, has become fully established in England, as shown by Kelley v. Kelley, L. R. 2 P. & D. 31, and on appeal, *59.

But the libellant's counsel are not satisfied with the law as they say it is, because it is too narrow for a just and righteous administration of it in cases like this, in which, they say, the wife should not be compelled to wait till her mental suffering has produced or threatened bodily harm; and therefore they urge the Court, as it is not hampered by precedents of its own, to take a position more consistent with the interests of humanity, to the attainment of which, they say, the courts of some of the other states have blazed the way. But in undertaking to follow the way said to be thus blazed, the same difficulty would be encountered that the counsel say attends the giving of a satisfactory definition of legal cruelty, and for the same reason, namely, the difference in the phraseology of statutes, held by the courts to limit or to extend their meaning. Mr. Bishop says on this subject that the statutes of a few of the states are in terms to invite a modification of the English rule, and cites the Civil Code of California (§ 94) as it was in 1885, which defined "extreme cruelty" as "the infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage." He goes on to say that some of those statutes permit divorce for excesses, cruel treatment, and outrages of a nature to render the living together of the parties insupportable, or employ other words of similar meaning; and that under them, mental suffering, without danger to the physical security, will suffice; or, on the other hand, that the statutes will be satisfied by blows alone. And he cites cases in Louisiana, Texas, Missouri, and Oregon, as coming under these "exceptional statutes" as he calls them. * * *

Mr. Bishop suggests what he calls a fair and just way of judicial escape from what he thinks are some of the absurdities of the books, without violating the doctrine of stare decisis, as that doctrine applies only to law, not to fact. He says that mental anguish, when deep and protracted, may well be deemed as dangerous to physical security as blows, and to occupy the same ground in the evidence of cruelty, and although this is a question of fact, that the court may as well take judicial notice of it as of the effect of blows. But he goes on to say, what makes against the idea of judicial notice, that if, in a particular case, it is the opinion of the court or the jury determin-

ing the fact, that the wife's health is in danger from ill conduct of the husband addressed primarily to the mind, she should have a divorce. 1 Bish. Mar., Div. & Sep. § 1552.

In referring to Bailey v. Bailey, 97 Mass. 373, 381, he says that if what is there said was in the minds of all judges and juries when considering cases of that sort, it would lead us to be reconciled to the rule of law that prevents the infliction of mere mental suffering from constituting ground for divorce. In that case it is said that if it be supposed that the interpretation of the statute there given does not sufficiently provide for a class of cases where, though the abusive language or conduct of one party does not affect the health of the other, yet makes the life of the other so wretched and intolerable that a divorce ought to be granted on account of the cruelty, the answer is that such supposed case cannot actually exist, for deeply wounded sensibility and wretchedness of mind can hardly fail to affect the health. 1 Bish. Mar., Div. & Sep. § 1566.

But this is not the position of the cases generally, and we are not prepared to adopt it. It is but recently, as we have seen, that the courts have come to think that mental suffering has anything to do with bodily ills; and it is too much to say that it is so certain that it does and will harm the body, and that this fact has, in so short a time, become a matter of such common knowledge, so known and notorious to all men, as Wigmore puts it, that it can be judicially noticed in all cases. There may be cases in which such notice may well be taken; as where the facts and circumstances are so decisive of bodily harm, actual or apprehended, that there can be no difference of opinion about it. But in cases short of that, we think the substantive fact must be found before it can be said to exist.

Nor do we regard the case in hand of the decisive character mentioned. The libellant herself, fifty-one years old, and in ordinary good health for a woman of her age, did not seem to be particularly apprehensive of bodily harm from the treatment of her husband, for she continued to cohabit with him till they left the farm the first of November, 1904, and although they never again set up housekeeping and lived together as husband and wife, yet on various occasions they occupied the same bed when visiting relatives, and occasionally had sexual intercourse up to and including January 5, 1905, two days after which he left her, much against her earnest protest and wishes, and went to Massachusetts to live, whither she went to see him, but did not, because he fled to Rhode Island to avoid her. She wrote to him, but got no answer. She saw him once, and tried to talk with him, but he would not speak to her nor see her. And up to the time this libel was brought, which was in June, 1906, the libellant desired to live with the libellee, and up to the time he left the State, she urged him to remain in Lyndon, hire a house, and live and cohabit with her as his wife.

We hold, therefore, that the essential fact of bodily harm or of a reasonable apprehension of such harm, is not established, unless we presume in favor of the judgment that the trial court inferred that fact from those certified up. But we cannot well do that on this record, especially as it says that the court decided the case "upon the findings of fact," which seems to preclude, or to make doubtful at least, the idea that the court inferred the all-essential fact from those findings.

Judgment reversed and cause remanded.[16]

MASSEY v. MASSEY.

(Appellate Court of Indiana, 1907. 40 Ind. App. 407, 80 N. E. 977, 81 N. E. 732.)

HADLEY, J. This is a suit instituted by appellant against appellee for divorce. Appellant filed an amended complaint, to which appellee filed a demurrer, which demurrer was sustained. Appellant refusing to plead further, judgment was rendered against him. The ruling of the court on the demurrer is the only error assigned. The complaint, after stating the marriage and the residence of the parties, avers that they separated January 12, 1905; that during the time of their marriage appellee continuously charged appellant with being untrue to her and of being an unchaste man; that she stated to numerous good citizens of the community that he was untrue to her and unchaste, all of which she knew to be false; that she endeavored to destroy his business, and constantly upbraided him for using her money therein; that she was petulant, irritable, and constantly complaining; that she frequently asserted she cared nothing for him, for his home, or his business, and refused to take any interest in his home, when able to do so, and also, when able to do so, refused to prepare the daily meals for him and his servants; that she read frivolous literature, to the neglect of her household duties; that she, for

[16] The cases on cruelty as a ground for divorce are very numerous, of diverse character and inharmonious. See an extensive note to the principal case in 18 L. R. A. (N. S.) 300, purporting to cover all cases involving false charges of adultery as a ground for divorce. Most of the cases contain other elements. See, also, a note in 13 L. R. A. (N. S.) at page 224 (1907), for a collection of cases involving the question as to what acts of one spouse, with respect to, or actuated by, a dislike of the relatives of the other, constitute cruel and inhuman treatment.

Must the cruel treatment complained of be willful, or intended to injure? On this point, see Robinson v. Robinson, 66 N. H. 600, 23 Atl. 362, 15 L. R. A. 121, 49 Am. St. Rep. 632 (1891), where the professional practice of Christian Science by the wife, causing business loss to the husband and resulting in injury to his health, was held extreme cruelty, the court saying, "A malevolent motive in the party complained of need not be shown. Divorce is not punishment of the offender, but relief to the sufferer." But see Ennis v. Ennis, 92 Iowa, 107, 60 N. W. 228 (1894), Freeborn v. Freeborn, 168 Mass. 50, 46 N. E. 428 (1897), and Brown v. Brown, 129 Ga. 246, 58 S. E. 825 (1907), holding that the cruel treatment must be willful, or intended to injure.

a long time prior to and on the day of separation, was cold, abusive, scornful, and indifferent to the happiness of the appellant; that by reason thereof she kept appellant in continual distress, and the trouble destroyed his peace of mind and broke up his home.

If this complaint states facts sufficient to constitute grounds for a divorce, it must be under the fourth clause of section 1044, Burns 1901 (§ 1032, R. S. 1881), which is as follows: "Cruel and inhuman treatment of either party by the other." That there can be cruel and inhuman treatment without physical violence is now so well settled that citation of authorities is useless. What constitutes cruel and inhuman treatment must be determined by the facts of the given case. As was said in the case of Kelly v. Kelly (1883) 18 Nev. 49, 1 Pac. 194, 51 Am. Rep. 732: "In considering extreme cruelty as a ground of divorce, courts have cautiously given it negative, rather than affirmative, definitions. The difficulty in giving it an affirmative definition arises from the fact that cruelty is a relative term; its existence frequently depends upon the character and refinement of the parties, and the conclusion to be reached in each case must depend upon its own particular facts. 'We do not divorce savages and barbarians because they are such to each other,' said the supreme court of Pennsylvania, in Richards v. Richards (1860) 37 Pa. 225. 'We can exercise no sound judgment in such cases (divorce cases) without studying the acts complained of in connection with the character of the parties, and for this we want the common sense of the jury rather than fixed legal rules.' Richards v. Richards, supra." Mere cold neglect has been held by our Supreme Court to be cruel and inhuman treatment, in the case of Rice v. Rice (1855) 6 Ind. 100, wherein the court say: "We may remark of this instruction that it seems to contemplate an entirely physical, sensual view of the marriage relation; and if that relation has no aim to the social happiness and mental enjoyments of those united in it, the instruction should have been given. But if it is otherwise, if it be true that we are possessed of social, moral, and intellectual natures, with wants to be supplied, with susceptibilities of pain and pleasure; if they can be wounded and healed, as well as the physical part, with accompanying suffering and delight, then, we think, that conduct which produces perpetual social sorrow, although physical food be not withheld, may well be classed as cruel, and entitle the sufferer to relief."

False charges of infidelity by a wife of a husband, widely circulated in the community, may cause the keenest suffering to the husband, in comparison to which blows would be insignificant. And, where, as averred here, these false statements are persistent, continuous, and are coupled with coldness, neglect, lack of interest in family affairs, aggressive action against his means of livelihood, irritability, petulancy and scorn, to the extent of breaking up his home, we can well perceive that they might produce the depths of distress and wretchedness that would naturally cause physical impairment. Kelly v.

Kelly, supra; Holyoke v. Holyoke (1886) 78 Me. 404, 6 Atl. 827; Whitmore v. Whitmore (1882) 49 Mich. 417, 13 N. W. 800; Carpenter v. Carpenter (1883) 30 Kan. 712, 2 Pac. 122, 46 Am. Rep. 108; McGee v. McGee (1904) 72 Ark. 355, 80 S. W. 579; Spitzmesser v. Spitzmesser (1901) 26 Ind. App. 532, 60 N. E. 315. It is well settled that the false charge of adultery by a husband against his wife is grounds for divorce under the charge of cruel and inhuman treatment. Graft v. Graft (1881) 76 Ind. 136; Shores v. Shores (1864) 23 Ind. 546. And, in reason, a wife's like accusation against the husband should be no less available to him in his suit for her cruelty. 1 Bishop, Mar., Div. and Sep. § 1636; § 1044, Burns' 1901 (§ 1032, R. S. 1881). In a suit by the husband for divorce on account of cruel treatment, where no actual violence is averred, it must clearly appear from the facts in the case that the acts of the wife have rendered the continuance of the marital relation so intolerable to the husband as to endanger his physical well-being. The averments of the complaint show that such a condition would exist under the facts therein averred, with a man of ordinary temperament, standing and self-respect. Appellee relies upon the case of McAlister v. McAlister (1888) 71 Tex. 695, 10 S. W. 294. From the reasoning in this case, it will appear that the statutes of Texas and the decisions thereunder provide a different rule in cases of this character than that which obtains in this State, and we do not think it should be of controlling force. The court bases its decision upon the following statement: "Wisely or not, our statutes do not make occasional acts of adultery on the part of the husband a cause of divorce when sought by the wife. Otherwise, when the husband asks divorce from the wife taken in adultery."

Cause reversed, with instructions to the lower court to overrule the demurrer to the amended complaint.[17]

MYERS, C. J., ROBY, P. J., and WATSON, J., concur. COMSTOCK and RABB, JJ., dissent.[18]

[17] In addition to the cases cited in the note to the preceding case, see note to the principal case in 7 Col. Law Rev. 621, with citation of authorities. In Russell v. Russell, 11 Times Law Rep. 579 (1895, Court of Appeal), it was held, Rigby, L. J., dissenting, that repeated accusations by the wife in public that the husband was guilty of sodomy was not cruelty. See, also, Evans v. Evans, 1 Hag. Con. 35 (1790), for general discussion of cruelty. In Anon., 2 Ohio N. P. 342 (1895), it was held that the commission of sodomy with a beast was extreme cruelty. Compare W—— v. W——, 141 Mass. 495, 6 N. E. 541, 55 Am. Rep. 491 (1886), where conduct of a different sort, but equally revolting, was held not to be cruelty; the court thinking that conduct, to be cruelty, should be directed at the other party. In Craig v. Craig, 129 Iowa, 192, 105 N. W. 446, 2 L. R. A. (N. S.) 669 (1905), it was held cruel and inhuman treatment for the husband to bring another woman into his home and openly profess love for her, causing mental distress resulting in ill health. See a note in 2 L. R. A. (N. S.) 669, collecting similar cases. In Berdolt v. Berdolt, 56 Neb. 792, 77 N. W. 399 (1898), it was held that a false charge of physical incompetency on the part of the wife to consummate the marriage might constitute extreme cruelty.

[18] The dissenting opinions of RABB and COMSTOCK, JJ., are omitted.

COWLES v. COWLES.

(Supreme Judicial Court of Massachusetts, 1873. 112 Mass. 298.)

Libel for divorce, in which the libellant set forth that he was married to Frances M. Dickinson, June 7, 1871; that soon after their marriage he and his wife commenced housekeeping, and that with occasional absences of the wife they continued to occupy the same house till April, 1872, since which time she has ceased to live with him; that she from the time of their marriage had been guilty of cruel and abusive treatment of him, in refusing to have any sexual intercourse with him, and had never had such intercourse, and had ever refused to have it. Wherefore he prayed that the bonds of matrimony between them might be dissolved.

The libellee was defaulted, and the libel was heard before Wells, J., who refused to grant either a divorce or a decree of nullity, solely on the ground that the utter denial of sexual intercourse was not a cause for which such a decree in either form could be made by the court. The libellant excepted.

COLT, J. This libel for divorce alleges cruel and abusive treatment only. In support of it the wife's utter denial of sexual intercourse is relied on. It is not now contended that any other cause of divorce exists.

Such conduct is not to be regarded, within a reasonable interpretation of the provision of St. 1870, c. 404, § 2, as cruel and abusive treatment. Under the like provision of Gen. St. c. 107, § 9, it has been held that the cruelty charged must appear to be such "as shall cause injury to life, limb, or health, or create a danger of such injury, or a reasonable apprehension of such danger." Bailey v. Bailey, 97 Mass. 373; Peabody v. Peabody, 104 Mass. 195; Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95.

It plainly does not go to the original validity of the marriage, and affords no ground for declaring the nullity of it. Exceptions overruled.[19]

[19] Accord: Severns v. Severns, 107 Ill. App. 141 (1903); Varner v. Varner, 35 Tex. Civ. App. 381, 80 S. W. 386 (1904); Johnson v. Johnson, 31 Pa. Super. Ct. 53 (1906). And see note in 14 L. R. A. 685, on "Refusal of Marital Intercourse as a Ground for Divorce." Whether refusal of marital intercourse amounts to desertion, see Fritz v. Fritz, post, p. 125. In Campbell v. Campbell, 149 Mich. 147, 112 N. W. 481, 119 Am. St. Rep. 660 (1907), refusal of marital intercourse, combined with false charges of adultery and other conduct, was held extreme cruelty.

MOSHER v. MOSHER.

(Supreme Court of North Dakota, 1907. 16 N. D. 269, 113 N. W. 99, 12 L. R. A. [N. S.] 820, 125 Am. St. Rep. 654.)

Action by Alfred Mosher against Eugenia Mosher. Judgment for plaintiff, and defendant appeals. Affirmed.

SPALDING, J.[20] Action by Alfred Mosher against Eugenia Mosher for divorce, on the ground of extreme cruelty, consisting in intentionally worrying and annoying the plaintiff, and pursuing a systematic course of ill treatment, using profane language, and telling obscene stories, and other acts, all of which are alleged to have caused the plaintiff grievous mental suffering. The defendant denies these charges, and asks affirmative relief, charging the plaintiff with failing to provide her with the necessaries of life, and with repeatedly accusing her of having married him from mercenary motives, and of her having loved other men and of her having illicit intercourse with other men. * * *

The plaintiff was a religious man, had been a church member for 35 years, and did not tolerate profanity or vulgarity in his family. One of the principal charges against the defendant was that she was very profane in her conversation in the presence of the plaintiff, and sometimes of third parties, and that she repeatedly told in his presence, and in the presence of his children, obscene stories, some of which are related by witnesses, and it is charged that these were the cause of grievous mental suffering on the part of the plaintiff, and the trial court so found. We cannot assume that the finding of the trial court is erroneous in the absence of evidence to the contrary. Whether the telling of obscene stories and the use of profanity by the wife in the presence of the husband and others is the cause of grievous mental suffering on the part of the husband depends very largely upon the temperament, religious training, and characteristics of the man, and his degree of sensitiveness to such improprieties. We can imagine a man whose moral nature may be so inactive as to render such conduct on the part of the wife inoffensive, but we think a great majority of men would be humiliated and chagrined by such conduct, which would cause in most cases more grievous mental suffering than other acts more violent in their nature. The evidence on this subject, taken as a whole, we think clearly indicates that it had the effect on the plaintiff which might be expected in a man of ordinary sensibilities and of a high standard of propriety. No general rule can be laid down on this subject, but each case where charges of this nature are made must be governed by its own peculiar facts.

Many other acts are shown to have been committed by the defendant, some of them trifling, and the most of them so, but occur-

[20] Part of the opinion is omitted.

ring as they did, at short intervals, in the way they did, they constitute a continuous course of conduct intended to aggravate and annoy the plaintiff. We shall not enter into details regarding these acts, as to do so would serve no purpose, and it is sufficient to say that, taken together, we are of the opinion that they warranted the judgment of the trial court. There is no issue of the marriage. The plaintiff, so far as the records disclose, was patient and considerate to a high degree. The fault-findings, threatenings, and complaints of the defendant seldom brought any retort from him. * * *

The judgment of the district court is affirmed. All concur.[21]

(C) Desertion

FRITZ v. FRITZ.

(Supreme Court of Illinois, 1891. 138 Ill. 436, 28 N. E. 1058, 14 L. R. A. 685, 32 Am. St. Rep. 156.)

Appeal from the Appellate Court for the Fourth District. Heard in that court on appeal from the Circuit Court of Pope County; Hon. Oliver A. Harker, Judge, presiding.

MAGRUDER, C. J.[22] This is a bill filed in the Circuit Court of Pope County on April 17, 1889, by the appellant against the appellee, his wife, praying for a divorce from her upon the alleged grounds, that she "has willfully absented herself from your orator without any reasonable cause for the space of two years, and has been guilty of extreme and repeated cruelty." The defendant answered denying the allegations of the bill, and replication was filed to the answer. The verdict of the jury and the judgment of the trial court were in fa-

[21] In a note to the principal case in 12 L. R. A. (N. S.) 820, it is said: "A careful search has disclosed no other case in which profanity and obscenity on the part of either husband or wife was the sole cause for divorce, either absolute or limited, on the ground of cruel and inhuman treatment. While profanity and vile epithets generally form one of the grounds for an application for relief from the marital union, yet other elements of a more serious nature have generally formed the real basis for the decree. The courts not infrequently discuss the subject of words as constituting cruel and inhuman treatment, but in practically all of these cases, while the words may be profane, yet they imply threats of physical harm." See, for a discussion of the effects of mere words, Fitzpatrick v. Fitzpatrick, 21 Misc. Rep. 378, 47 N. Y. Supp. 737 (1897); Hewitt v. Hewitt (N. J. Ch.) 37 Atl. 1011 (1897); Rosenfeld v. Rosenfeld, 21 Colo. 16, 40 Pac. 49 (1895); Shuster v. Shuster, 3 Neb. (Unof.) 610, 92 N. W. 203 (1902); Duberstein v. Duberstein, 171 Ill. 133, 49 N. E. 316 (1897).

See the following miscellaneous cases: Ring v. Ring, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878 (1903), habitual use of morphine is not cruel treatment; Crutcher v. Crutcher, 86 Miss. 231, 38 South. 337 (1905), crime of "pederasty" is cruel and inhuman treatment; Vercade v. Vercade, 147 Mich. 398, 110 N. W. 942 (1907), desertion for less than statutory period is not extreme cruelty.

[22] Part of the opinion is omitted.

vor of the defendant. The present appeal is from the judgment of the Appellate Court affirming the judgment of the Circuit Court.

The first question in the case arises out of the refusal of the trial court to give the 3d, 4th, 5th, 6th and 7th instructions asked by the complainant below. These instructions, in substance, announce the doctrine, that, where a wife refuses, without good cause, to have sexual intercourse with her husband for a period of two years or more, such conduct amounts to willful desertion. Mr. Bishop, in his very able work upon Marriage and Divorce, gives this doctrine his support. 1 Bish. on Mar. & Div. (6th Ed.) §§ 778, 778a, 779. It is not, however, sustained by well considered authorities. The cases favoring it, to which we have been referred, are Heermance v. James, 47 Barb. (N. Y.) 120; Fishli v. Fishli, 2 Litt. (Ky.) 337; Sisemore v. Sisemore, 17 Or. 542, 21 Pac. 820. In no one of these cases did the question fairly arise, whether the neglect of this one of the marital duties, without the neglect of any other of such duties, by itself constituted willful desertion.[23] The Heermance Case was an action for damages for depriving the plaintiff of the affections, comfort, fellowship, society, and aid and assistance of his wife in his domestic affairs, and arose upon demurrer to the complaint filed in the action. In the Fishli Case, the husband had abandoned his wife for the space of two years, and sought to meet the charge of such abandonment by setting up, that, a few weeks before the expiration of the two years, he had made an offer to support his wife in his own house, or in lodgings, as she might prefer. In the Sisemore Case, it appeared that the offense of the wife was not so much the one now under consideration, as her refusal to remove to a new home selected by her husband in another county.

The doctrine contended for rests mainly upon the idea, that sexual intercourse is "the central element of marriage to which the rest is but ancillary," and, while it may be urged with no little force, that the refusal of such intercourse by one of the parties to the marriage contract is such a violation of marital duty that it ought to be regarded as a good ground of divorce, yet the question before us is simply as to the meaning of our statute. The Divorce Act provides that a divorce may be granted where either party "has willfully deserted or absented himself or herself from the husband or wife, without any reasonable cause, for the space of two years." We think that the willful desertion here referred to was intended to mean the abnegation of all the duties of the marital relation, and not of one alone.

In Carter v. Carter, 62 Ill. 439, desertion is treated as synonymous with absence, and absence involves the neglect of other duties than the one in question. The Supreme Court of Maine, in speaking up-

[23] See, also, a note in 14 L. R. A. 685, distinguishing the cases cited by Bishop and collecting authorities.

on this subject, says: "Sexual intercourse is only one marital right or duty. There are many other important rights and duties. The obligations the parties assume to each other, and to society, are not dependent on this single one. Many of these obligations, fidelity, sobriety, kind treatment, etc., have legal sanctions, and can be enforced, or their breach remedied by legal process." Stewart v. Stewart, 78 Me. 548, 7 Atl. 473, 57 Am. Rep. 822.

The view of this subject, which commends itself to our approval, is that announced by the Supreme Court of Massachusetts in Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95, where Chief Justice Bigelow says: "The word desertion in the statute does not signify merely a refusal of matrimonial intercourse, which would be a breach or violation of a single conjugal or marital duty or obligation only, but it imports a cessation of cohabitation, a refusal to live together, which involves an abnegation of all the duties and obligations resulting from the marriage contract. The later case of Magrath v. Magrath, 103 Mass. 577, 4 Am. Rep. 579, does not overrule the Southwick Case, in so far as the latter holds that the refusal of matrimonial intercourse is not of itself sufficient to justify a divorce on the ground of desertion. The divorce for desertion was allowed in the Magrath Case, because, in addition to the husband's intentional and permanent abandonment of all matrimonial intercourse with his wife, he withdrew from her his companionship and the protection of his home. It is there said, after referring to the Southwick Case: "The case at bar goes much further. Here there has been for the time required by the statute, an abnegation on the part of the husband of all the chief duties and obligations, which result from the marriage contract and distinguish it from others. There is no more important right of the wife than that, which secures to her in the marriage relation the companionship of her husband and the protection of his home."

The same view has been adopted in Maine. In Stewart v. Stewart, supra, it is said: "This case therefore presents the question whether the legislature, by that statute, intended to authorize a divorce where one party, without good cause, denies the other sexual intercourse for three consecutive years. * * * It has been expressly held that such refusal is not the desertion contemplated by the statutes authorizing divorces for desertion. Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95; Steele v. Steele, 1 McArthur (D. C.) 505. * * * We do not think our legislature intended to call the denial of this one obligation an 'utter desertion,' while the party might be faithfully and perhaps meritoriously fulfilling all the other marital obligations."

Some importance is attached in the Stewart Case to the fact, that the Maine statute uses the word "utter" before "desertion." But we do not think that the absence of that word from our statute affects the construction of its language with reference to the point now un-

der consideration. It is a mistake to say, as it is stated in Stewart v. Stewart, supra, and in Bishop on Mar., Div. and Separation, § 1680, that the Southwick Case is based upon a statute providing for "utter" desertion. The Southwick Case was decided in 1867, before the Massachusetts statute of 1882, referred to in Stewart v. Stewart, was passed, and the statute in force in Massachusetts in 1867 did not use the word "utter," as is shown by the remarks of the Court in Southwick v. Southwick, supra. In our opinion, refusal of sexual intercourse alone cannot be construed to mean willful desertion without reasonable cause under the Illinois statute, any more than it can be construed to mean utter desertion under the Maine statute. * * *

At common law, whenever either the husband or wife was guilty of the injury of subtraction, or lived separate from the other without any sufficient reason, a suit could be brought in the ecclesiastical courts for a restitution of conjugal rights. But those courts made a distinction between "marital intercourse," or sexual intercourse, and "marital cohabitation," or living together. They enforced the latter, but not the former. They merely required the offending party to return and live with the libellant. In such proceedings, the cessation of cohabitation warranted a decree, but the suit for restitution of conjugal rights could not be maintained on the ground of a refusal of marital intercourse. Desertion in such suits was held to signify a refusal to live together, and, in this country, the action for divorce on the ground of desertion is a substitute for the English proceeding for the restitution of conjugal rights. Black. Com. book 3, marg. page 94; 1 Bish. on Mar. & Div. (6th Ed.) § 778; Orme v. Orme, 2 Add. Ec. 382; Forster v. Forster, 2 Hag. Con. 144, 154; Stewart v. Stewart, supra; Southwick v. Southwick, supra. * * *

For the reasons thus stated, we are of the opinion, that the court below committed no error in refusing to give the instructions numbered 3, 4, 5, 6 and 7, which were asked by the complainant. * * *

The judgment of the Appellate Court is affirmed. Judgment affirmed.[24]

[24]In addition to the cases cited in 14 L. R. A. 685, see also, accord: Watson v. Watson, 52 N. J. Eq. 349, 28 Atl. 467 (1894); Pratt v. Pratt, 75 Vt. 432, 56 Atl. 86 (1903); Williams v. Williams, 121 Mo. App. 349, 99 S. W. 42 (1907); Pfannebecker v. Pfannebecker, 135 Iowa, 425, 110 N. W. 618, 119 Am. St. Rep. 608, 12 Ann. Cas. 543 (1907). Civ. Code Cal. § 96, provides that "persistent refusal to have reasonable matrimonial intercourse" shall be evidence of desertion, justifying a divorce, "when health and physical condition does not make such refusal reasonably necessary." Held, under this statute, that an unexplained refusal by the wife for three or four weeks after her marriage was insufficient to entitle the husband to a divorce. Hayes v. Hayes, 144 Cal. 625, 78 Pac. 19 (1904). In Synge v. Synge, [1900] Prob. 180, it was held that if the wife refused to live with the husband, except upon his undertaking not to exercise his right of marital intercourse, he was justified in separating himself from her, and was not guilty of desertion. It was also said that such conduct amounts to desertion on her part. Affirmed in Synge v. Synge, [1901] Prob. 317.

PIDGE v. PIDGE.

(Supreme Judicial Court of Massachusetts, 1841. 3 Metc. 257.)

Libel for divorce a vinculo, alleging willful and utter desertion for the term of five years.

At the hearing before Putnam, J., it was proved that the respondent abused and beat the libellant, and that she thereupon left his house and never returned to him, nor offered to return. They thereupon lived apart for more than five years, respondent making no provision for her support.

Divorce decreed. Exceptions by respondent.

DEWEY, J.[25] The libellant seeks to procure a divorce from the bond of matrimony, and insists, that upon the facts stated in the case, she brings herself within the provisions of St. 1838, c. 126. This statute enacts, that "a divorce from the bond of matrimony may be decreed in favor of either party, whom the other shall have willfully and utterly deserted for the term of five years consecutively, and without the consent of the party deserted." The statute seems to prescribe three things as essential to the maintenance of such libel. 1. A willful and utter desertion of the libellant by the libellee. 2. That such desertion by the libellee be continued five years consecutively. 3. That the desertion be without the consent of the libellant.

It is obvious, therefore, that the mere fact that the parties have lived in a state of separation for five years, is wholly insufficient to bring the case within the statute. The libellant must proceed a step further, and show that this separation was occasioned by the desertion of the libellee, and that this desertion was without the consent of the libellant.

It is quite apparent that in the present case these facts are not shown in the ordinary and literal sense of the words of the statute. The object of the libellant's evidence was rather, as it would seem, to show such alienation of feeling on the part of the husband, accompanied with personal abuse, and gross negligence in providing for her wants, as would justify her in leaving him, and continuing to reside apart from him with her friends, during the term of five years.

We shall assume, in the further consideration of the subject, that the libellant has satisfactorily shown that her separation from her husband was occasioned by his extreme cruelty, and that her withdrawing from him was reasonably justified by fears as to her personal safety. This, as a matter of fact, was established at the hearing before a single judge, at nisi prius, and we do not go behind the report, as to the facts. The present inquiry is, whether a separation, under such circumstances, can be held to be a desertion by the hus-

[25] The statement of facts and the opinion are abridged. The dissenting opinion of Putnam, J., is omitted.

band, and properly authorize us to grant a divorce a vinculo matrimonii.

On the part of the libellant it is contended, that the term "desertion" may reasonably be so construed as to include the willful neglect of the husband to discharge the duties of the marriage relation, either by gross neglect to make suitable provision for his wife, or by exciting in her well-grounded fears for her personal safety; and that if, for such or any other sufficient cause, she leaves his house and seeks protection elsewhere, and continues this separation for the term of five years—the husband doing nothing in the mean time to change the relation between the parties—this would present a case within the statute.

Before the passage of this statute, the only grounds for a divorce from the bond of matrimony between parties competent to form this connexion, were, the commission, by one of the parties, of the crime of adultery, or a conviction of some crime of that infamous character, which should deserve, and have received a judicial sentence of punishment in the state prison or county jail, for a period of not less than seven years. Rev. St. c. 76, § 5. By the provisions of St. 1838, c. 126, a great change is introduced, and a divorce from the bond of matrimony may be now decreed without any crime having been committed by the libellee, cognizable by a court of criminal jurisdiction. This change of the law of divorce has been, by the terms of the statute introducing it, confined to a single class of cases, and that specified with a good degree of precision. By the terms of that statute, the libel is to be filed and the divorce decreed in favor of that party "whom the other shall have willfully and utterly deserted for the term of five years consecutively, and without the consent of the party deserted." Beyond the cases provided for in the statute, it is neither our duty nor inclination to give facilities to the dissolution of the marriage contract. Had it been the purpose of the legislature to authorize a divorce from the bond of matrimony for extreme cruelty, or gross neglect to provide suitable maintenance for the wife, we must suppose that these cases would have been specified in the statute of 1838; and the fact that they are not so specified seems conclusive on the point of the intention of the legislature.

We are the more confirmed in this view from the fact, that the three subjects of desertion, extreme cruelty, and gross neglect to provide suitable maintenance, are all specially provided for in Rev. St. c. 76, § 6, and made the foundation for a divorce from bed and board. All these cases being thus by the revised statutes provided for by one and the same law, the legislature have selected the case of willful desertion, and made it the subject of a special provision, leaving the other cases to be governed by the former provisions of the revised statutes. It seems to us, therefore, that the statute of 1838 is limited to the case of willful desertion by the libellee; and that extreme cruelty, or neglect to provide suitable maintenance for the wife, by reason

of which she is justified in leaving her husband, does not present the case of desertion by the husband, which is contemplated and required by this statute. To hold otherwise would be adding to the provisions of this statute, and opening a door for the greatest latitude in granting divorces.

The broad ground is, as I understand, assumed by the libellant, that if for any good and sufficient reason arising from the misconduct of the husband, the wife shall withdraw from his society and his dwelling, she may, by thus withdrawing, and continuing to live apart from him for five consecutive years, put herself in a situation to demand, as a matter of right, a divorce from the bond of matrimony, under this statute. To what extent will this doctrine carry the provisions of the statute? Personal violence is not the only misconduct on the part of the husband, that might justify the wife in withdrawing from his roof. There are other sufferings not less intense than those occasioned by bodily wounds. Angry words, coarse and abusive language, grossly intemperate habits, might bring greater sufferings upon a refined and delicate woman, than a single act of violence upon her person, and might well, in the reasonable judgment of the public, authorize her withdrawing from the society of her husband. But the legislature has annexed no such penalty, as a divorce from the bond of matrimony, for causes like those just enumerated. Yet such would be the practical construction of the statute, if it be admitted, that in cases where the wife leaves her husband for justifiable cause arising out of his misconduct, such separation is legally and technically a desertion by the husband.

It is strongly urged that the separation by the wife, in cases like the present, is virtually an involuntary separation on her part; that she is not to be treated as having acted as a free agent in withdrawing from her husband; and therefore that she cannot be properly said to have deserted him, and that her separation from him ought not and cannot properly be urged against her, on this occasion. This argument is, in my opinion, entirely misapplied, when urged, as it now is, to sustain a libel filed by the wife, charging her husband with desertion. It would be entirely sound, and availing too, if urged in defence of the wife, on the husband's seeking a divorce, and alleging, as the ground for the application, a willful desertion by the wife. * * *

Libel dismissed.[26]

[26] Contra: Sickert v. Sickert, [1899] Prob. 278; Koch v. Koch, [1899] Prob. 221; Curlett v. Curlett, 106 Ill. App. 81 (1903); Lister v. Lister, 65 N. J. Eq. 109, 55 Atl. 1093 (1903), affirmed in 66 N. J. Eq. 434, 57 Atl. 1132 (1904); Rigsby v. Rigsby, 82 Ark. 278, 101 S. W. 727 (1907); Davenport v. Davenport, 106 Va. 736, 56 S. E. 562 (1907); Hudson v. Hudson, 59 Fla. 529, 51 South. 857, 29 L. R. A. (N. S.) 614, 138 Am. St. Rep. 141, 21 Ann. Cas. 278 (1910).

JAMES v. JAMES.

(Supreme Court of New Hampshire, 1878. 58 N. H. 266.)

Libel, for divorce. Cause assigned, the willing absence of the husband from the wife for three years together, without making suitable provision for her support. The libellant, previous to her marriage, lived with her parents in this state. At the time of their separation, the parties lived in Canada. In July, 1871, the libellant procured money from her father and returned to this state, where she has since lived. She left the libellee because of his intemperate habits, and his failure to support her. He did not otherwise, ill-treat her. He had no property, but, when he would work, could earn $36 a week, and had work to do when he would do it. Libel dismissed, the libellant excepting.

SMITH, J.[27] * * * The remaining question is, whether it has been shown that the libellee has willingly absented himself from his wife for three years together, without making suitable provision for her support.

There are decisions which hold that if a husband so abuses his wife as to render living with him personally unsafe for her, and for that reason she leaves him, she can maintain against him a suit for divorce, relying on such conduct as constituting desertion by him. 2 Dane Ab. 308; Reeve Dom. Rel. 207; Wood v. Wood, 27 N. C. 674; Almond v. Almond, 25 Va. 662, 15 Am. Dec. 781; Camp v. Camp, 18 Tex. 528. Such conduct seems, upon principle, to show the intent of the husband to desert, on the familiar rule that a person is intended to presume the natural and probable consequences of his acts; that there can be no distinction between his intending to oblige her to leave him, and intending himself to leave her. Bishop on Mar. and Div. 515. * * *

Pidge v. Pidge, 3 Metc. (Mass.) 257, was a libel for divorce a vinculo, alleging the willful and utter desertion of the libellant by the respondent. The evidence showed that the latter, without provocation, abused and beat the libellant, whereupon she left him, and never returned nor offered to return to him, and the respondent made no effort to cohabit with her, and made no provision for her support. It was held by a majority of the court, under a statute which enacted that a divorce a vinculo might be decreed in favor of either party whom the other shall have willfully and utterly deserted for the term of five years consecutively without the consent of the party deserted, that the libel could not be maintained. The decision appears to have been put upon the ground that desertion, extreme cruelty, and gross neglect to provide suitable maintenance, were made the foundation

[27] Part of the opinion, on the question of the libelee's ability to support his wife, is omitted.

by statute for divorce a mensa et thoro, and that it would be adding to the provisions of the statute to hold that the wife may treat the husband as the deserting party, when she is compelled by his misconduct to live apart from him. It does not appear that the question, whether the ill-conduct of the husband was intended to bring about a separation made necessary for the safety of the wife, was brought to the attention of the court. The statute was subsequently amended so as to include such cases.

The very able dissenting opinion, by Mr. Justice Putnam, affords conclusive reasons why, under a statute like ours, a different result should be reached. The learned judge said that, "to all legal and reasonable intendments, the wife, who is obliged to fly from her husband's violence and home into the street for her preservation, is to be considered to be there not of her own free will, but by reason of the force and violence of her husband. He has driven her from him, and it would be a perversion of terms to say that she, under those circumstances, deserted him."

The case finds that the libellant was compelled to separate from her husband because of his drunkenness, and of his neglect to furnish her and her child with the means of support. There was no other alternative for her except to remain and suffer, and perhaps starve. The law is not unreasonable, and does not require of the wife such sacrifice of her comfort or existence. The living with an habitual drunkard, in the wretchedness, suffering, and poverty resulting from such a life, may be more intolerable to a wife than occasional acts of cruelty. The natural and probable result of the libellee's drunken life and neglect to provide for the support of his wife was that which actually did take place. Having no home of her own, and no means of support, and the home he was bound to provide being no longer habitable, she returned to the home of her father. Judged by his acts and their natural result, the libellee intended to produce the separation of his wife from himself.

A wife abandoned by her husband in another state, who, though able, makes no provision for her support, may return to her parents here, and if subsequently the desertion continues for three years together, no provision for her support being made by him, she is entitled to a divorce. Frary v. Frary, 10 N. H. 61, 32 Am. Dec. 395; Kimball v. Kimball, 13 N. H. 222; Payson v. Payson, 34 N. H. 518. There is no distinction in principle between the desertion by the husband under such circumstances, and the compulsory separation caused by his ill-conduct. In the one case he abandons her to suffer and starve by his voluntary desertion of her; in the other he leaves her to the same fate by his voluntary ill-treatment and neglect.

We think, upon the facts shown in this case, the libellant is entitled to treat the result of her husband's ill-conduct and neglect of herself as willing absence on his part. If at the trial term she can show that,

during the period of absence alleged, the libellee had the ability to provide for her support, a divorce will be decreed; otherwise, the libel must be dismissed.

Case discharged.[28]

BINGHAM, J., did not sit.

DOUGLASS v. DOUGLASS.

(Supreme Court of Iowa, 1871. 31 Iowa, 421.)

Action for divorce. The district court dismissed the plaintiff's petition, and rendered judgment against her for costs; she appeals.

COLE, J. The plaintiff bases her claim for divorce upon the fourth subdivision of Revision, § 2534: "When he willfully deserts his wife and absents himself without a reasonable cause for the space of two years." There is no conflict in the evidence as to the facts of the case. The parties were married in September, 1858; they lived together happily until the 14th day of September, 1867, during which time there were four children born to them, three of whom had died. Prior to the time last stated, the defendant became insane, and was sent to the asylum at Mt. Pleasant, and a guardian for his property, etc., was appointed. At that date, having been discharged from the asylum as cured, the defendant returned to his friends, but refused to live with plaintiff as his wife; he made his home with his mother in the same neighborhood, and engaged in his usual work, but refused to provide in any way or part for plaintiff or their child. In

[28] See note to previous case.

See the following cases involving miscellaneous points: In De Laubenque v. De Laubenque, [1899] Prob. 42, it was held that the husband was guilty of desertion, though they had never lived together, where the wife was willing to live with him until she learned that he was living in adultery with another woman. In the following cases the husband was held guilty of desertion, though he continued to provide money for his wife's support: Magrath v. Magrath, 103 Mass. 577, 4 Am. Rep. 579 (1870); Elzas v. Elzas, 171 Ill. 632, 49 N. E. 717 (1898); Power v. Power, 66 N. J. Eq. 320, 58 Atl. 192, 105 Am. St. Rep. 653 (1904). In re Ralston's Appeal, 93 Pa. 133 (1880), semble, contra. In Franklin v. Franklin, 190 Mass. 349, 77 N. E. 48, 4 L. R. A. (N. S.) 145, 5 Ann. Cas. 851 (1906), it was held that a wife's refusal to emigrate from England to America was desertion. In the note to this case in 4 L. R. A. (N. S.) 145, it is said that Franklin v. Franklin is the first case to squarely decide this point. There are many cases involving the wife's duty to follow her husband within the same country. See the note in 4 L. R. A. (N. S.) 145, for cases on this point. In Albee v. Albee, 141 Ill. 550, 31 N. E. 153 (1892), it was held that the wife was not guilty of desertion in refusing to live in the house of her mother-in-law. And see note in 13 L. R. A. (N. S.) 222 (1907), on "Relations between One Spouse and Relatives of the Other as Affecting the Question of Desertion." In the following cases it was held that one spouse is justified in leaving another only where the leaving is due to such conduct as would constitute ground for divorce: Laing v. Laing, 21 N. J. Eq. 248 (1870); Fritz v. Fritz, 138 Ill. 436, 28 N. E. 1058, 14 L. R. A. 685, 32 Am. St. Rep. 156 (1891); Sarfaty v. Sarfaty, 59 N. J. Eq. 193, 45 Atl. 261 (1900); Barnett v. Barnett, 27 Ind. App. 466, 61 N. E. 737 (1901); Walton v. Walton, 114 Ill. App. 116 (1904); Crounse v. Crounse, 108 Va. 108, 60 S. E. 627 (1908).

February, 1868, there was a judicial examination as to his condition, and he was pronounced sane, and then settled with his guardian, who was discharged. At this examination the defendant asserted that he never intended to live with plaintiff again, but gave no reason, and refused to do so when asked. In the April following (1868), the defendant was again sent to the asylum, and another guardian appointed. The defendant corresponds with his friends, but refuses to write to his wife, although she has written him and urged him to answer. The defendant has never abused the plaintiff, nor have they had any particular quarrel. Plaintiff has earned her own living and the support of her child since he first went to the asylum; she is a woman of excellent character. This suit was brought in March, 1870.

This evidence satisfactorily establishes the fact that the defendant has willfully deserted his wife without a reasonable cause, and that he has absented himself for the space of two years. This is not controverted; but it is claimed that the statute requires that both the desertion and absence shall be without a reasonable cause. For the purposes of this decision that construction might be conceded, though it may well be questioned whether the true and correct construction is not that the wife shall be entitled to a divorce when the defendant willfully deserts her without a reasonable cause and absents himself for two years. See Hewes v. Hewes, 7 Gray (Mass.) 279; Besch v. Besch, 27 Tex. 390. But, even if it be held that the reasonable cause applies equally to the absence as to the desertion, then the inquiry as to the meaning of the term "reasonable cause" in this connection. Does it mean that the husband, having willfully deserted his wife, shall, by showing a reasonable cause for his continued absence, defeat the wife's right of action? If so, suppose he should show that he became engaged in a very profitable mining operation and was accumulating wealth very rapidly for his family, which would have been sacrificed by his return to his wife within the time? This would ordinarily be regarded as a reasonable cause for a protracted absence. Or, suppose he became unjustly suspected of the crime of murder and was wrongfully arrested and committed for trial, whereby he was detained beyond the two years. This would surely be a reasonable cause for his delay in returning. But this is not the meaning of the statute. The statute means that if the husband willfully deserts his wife when she has not by her conduct given him a reasonable cause, and shall absent himself for two years when she has given him no reasonable cause for remaining away, then she shall be entitled to a divorce. The reasonable cause of the statute can only be established by showing wrongful conduct on her part, amounting to a good excuse for his absence. No other reasonable cause for the two years' absence than that arising from the acts, declarations or conduct of the wife can be shown to defeat her right of action. In other words, the absence of the husband must be excused by the fault of the wife, and not by the fault or misfortune of the husband.

This must be the correct construction of the statute. For, if the term "reasonable cause" applies equally to the "desertion" and the "absence," then it must apply to them in the same sense. And it will not admit of controversy that when a husband willfully deserts his wife, he can justify that action only by showing wrong or fault on her part. As it is clear that no fault or misfortune of his will excuse his willful desertion, so no fault or misfortune of his will excuse his absence for the space of two years. The statute, it will be observed, does not require that the absence shall be willful.

How much soever we may sympathize with the defendant in his misfortune and would be ready to commend the self-sacrifice and devotion that would lead the plaintiff to cling closer to him, even though his affection, like his reason, may be permanently clouded, yet the statute is the measure of the plaintiff's rights, and it is our duty to enforce it. Reversed.[29]

BECK, J., dissenting.

STORRS v. STORRS.

(Supreme Court of New Hampshire, 1894. 68 N. H. 118, 34 Atl. 672.)

Libel for divorce, for abandonment, filed September 27, 1893. The parties were married January 1, 1878, and lived together until June, 1882, when the defendant abandoned the plaintiff without cause and without his consent. In the fall of 1882 the defendant became incurably insane and incapable of performing her marital duties. In February, 1883, she was placed in the asylum for the insane, where she has ever since remained. She appeared by a guardian ad litem.

CARPENTER, J. A libel may be maintained and a divorce decreed against an insane person for causes of divorce which arose and became complete before the defendant became insane. Mansfield v. Mansfield, 13 Mass. 412; Mordaunt v. Moncrieffe, L. R. 2 Sc. & Div. App. 374. Insanity at the time of the commission of the acts constituting the ground of divorce is a full defence. Broadstreet v.

[29] In Blandy v. Blandy, 20 App. D. C. 535 (1902), contra, where the statute read, "For willful desertion and abandonment by the party complained of against the party complaining, for the full interrupted space of two years," Alvey, C. J., said: "For the continued desertion must depend upon the continued intention, and, as has been well said, but for the insanity of the wife she may have repented and returned to her husband before the expiration of the statutory period. Storrs v. Storrs, 68 N. H. 118 (1894), 34 Atl. 672; Nichols v. Nichols, 31 Vt. 328, 331 [73 Am. Dec. 352]; Pile v. Pile, 94 Ky. 308 [22 S. W. 215]." In Kirkpatrick v. Kirkpatrick, 81 Neb. 627, 116 N. W. 499, 16 L. R. A. (N. S.) 1071, 129 Am. St. Rep. 708 (1908), also contra, where the statute read, "Where either party willfully abandons the other without just cause, for a period of two years," Good, C., said: "We are of the opinion that the statute means and contemplates that the abandonment should be willfully continued by the offending party for the full period of two years."

Broadstreet, 7 Mass. 474; Garnett v. Garnett, 114 Mass. 379, 19 Am. Rep. 369; Nichols v. Nichols, 31 Vt. 328, 73 Am. Dec. 352.[30]

Abandonment, to constitute a cause of divorce, must continue for three years together. P. S. c. 175, § 5. The time during which the defendant has been insane cannot be included in computing the statutory period. But for her insanity, it may be that she would have repented and returned to her husband.

Libel dismissed.[31]

CHASE, J., did not sit; the others concurred.

DANFORTH v. DANFORTH.

(Supreme Judicial Court of Maine, 1895. 88 Me. 120, 33 Atl. 781, 31 L. R. A. 608, 51 Am. St. Rep. 380.)

WALTON, J.[32] The question is this: If a wife deserts her husband, and remains away from him for three consecutive years, and, during all that time, continuously and unreasonably refuses to return, will the fact that, within the three years, her husband once visited her and occupied the same bed with her for two or three nights, necessarily interrupt the desertion and bar his right to a divorce for that cause?

We think not. Desertion, such as will be a valid cause for a divorce, is not easily defined. Stewart v. Stewart, 78 Me. 548, 7 Atl. 473, 57 Am. Rep. 822, and cases there cited. And it may be equally difficult to define what will constitute an interruption or condonation of desertion. The authorities are conflicting and confusing.

In Kennedy v. Kennedy, 87 Ill. 250, where a wife, without justification, refused to go to a new home which her husband had prepared for her, and remained away for the statutory length of time necessary to create a valid ground for divorce, the court held that the fact that, on one occasion, he cohabited with her at her brother's house, did not interrupt the desertion or bar his right to a divorce.

And we have reached the same conclusion. "Utter desertion continued for three consecutive years," is one of the causes for which a divorce may be granted. R. S. c. 60, § 2. And we think that if a wife deserts her husband and remains away from him for the full period of three consecutive years, and, during all that time, continuously and unreasonably refuses to return, his right to a divorce is complete, and can not be defeated by proof that on one occasion,

[30] Accord: Fisher v. Fisher, 54 W. Va. 146, 46 S. E. 118 (1903); Andrews v. Andrews' Committee, 120 Ky. 718, 87 S. W. 1080, 27 Ky. Law Rep. 1119 (1905).

[31] Accord: Blandy v. Blandy, 20 App. D. C. 535 (1902); Kirkpatrick v. Kirkpatrick, 81 Neb. 627, 116 N. W. 499, 16 L. R. A. (N. S.) 1071, 129 Am. St. Rep. 708 (1908).

[32] Only the opinion is given.

within the three years, he visited his wife, and, for two or three nights, occupied the same bed with her.

Such a visit is not illegal or improper. On the contrary, it has often been held to be the duty of the husband to visit his absent wife, and to endeavor by all proper means to effect a reconciliation. If he succeeds, and his wife returns to her home and to her duties as his wife, undoubtedly her prior desertion will be interrupted, or regarded as condoned, and can not be added to a subsequent desertion for the purpose of completing the three years necessary to entitle her husband to a divorce. But if, in spite of his efforts, his wife persistently and unreasonably refuses to return, and continuously remains away from him for three consecutive years, we think her husband's right to a divorce is complete,—that the mere fact that on one occasion he visited her, and for two or three nights occupied the same bed with her, does not interrupt the continuity of her desertion.

Case remanded for further hearing in the court below.[33]

(D) Imprisonment

LEONARD v. LEONARD.

(Supreme Judicial Court of Massachusetts, 1890. 151 Mass. 151, 23 N. E. 732, 6 L. R. A. 632, 21 Am. St. Rep. 437.)

C. ALLEN, J.[34] The libellant seeks a divorce from her husband on the ground that he has been sentenced to imprisonment at hard labor in the state prison at Waupun, Wisconsin, for a term of seven years

[33] In Kennedy v. Kennedy, 87 Ill. 250 (1877), accord, the deserted husband went to the wife, who was at fault. Walker, J., said (page 254): "Had she gone to his house and they had so cohabited, then there would have been entirely a different question presented. So, if she had offered to return, and he had refused to receive her at his home." In Burk v. Burk, 21 W. Va. 445 (1883), the facts were similar to those in the Kennedy Case, except that the cohabitation was more extensive. In speaking of the Kennedy Case, Johnson, President, said (page 454): "This is the only case, so far as I know, in which such doctrine is held. We cannot approve it. We think it wrong in principle and decidedly dangerous to good morals in its tendency."

In the following cases, the deserting spouse returned, and it was held that the period of abandonment was interrupted: Ex parte Aldridge, 1 Swab. & T. 88 (1858); Gaillard v. Gaillard, 23 Miss. 152 (1851); Woolfolk v. Woolfolk, 96 Ky. 657, 29 S. W. 742 (1895). The period of abandonment is also interrupted by a bona fide offer to return on the part of the deserting spouse. Loux v. Loux, 57 N. J. Eq. 561, 41 Atl. 358 (1898); McGowan v. McGowan (Tex. Civ. App.) 50 S. W. 399 (1899); Stoneburner v. Stoneburner, 11 Idaho, 603, 83 Pac. 938 (1906). If the offer to return is in fact made in good faith, the deserted spouse has no right to assume that it is insincere and untruthful, without investigation. Meier v. Meier, 68 N. J. Eq. 9, 59 Atl. 234 (1904). An offer to return is not made in good faith, if the husband at the time of making the offer is living in adultery, or willingly permits the wife to believe that he is. Lisler v. Lisler, 65 N. J. Eq. 109, 55 Atl. 1093 (1903). In Graves v. Graves, 88 Miss. 677, 41 South. 384 (1906), the deserting wife returned to her husband's house, but refused to sleep with him; held, the abandonment was not interrupted.

[34] Only the opinion is given. At the hearing below the libel was dismissed.

and six months; and the question presented to us is whether such a sentence passed in another State is a good cause of divorce here. Pub. St. c. 146, § 2, provides that a divorce may be decreed "when either party has been sentenced to confinement at hard labor for life or for five years or more in the state prison, or in a jail or house of correction." The first statute in this Commonwealth making a sentence to imprisonment a cause of divorce was Rev. St. c. 76, § 5, where the language is substantially the same as that quoted above, except that the term required is seven years or more. Desertion was not made a cause of divorce till afterwards, by St. 1838, c. 126, and it is therefore apparent that the sentence to imprisonment was not deemed merely to be substantially equivalent to a desertion. It imported an offence, the nature of which was known to the Legislature. Imprisonment elsewhere might be for a cause punishable here for a less term, or possibly not punishable here at all. The term "the state prison," when used without further description in the Revised Statutes, as well as in the more recent legislation, means the state prison of this Commonwealth. Beard v. Boston, 151 Mass. 96, 23 N. E. 826. No instance to the contrary has been cited to us, and we do not now recall any. If a state prison elsewhere was intended, it would be natural to say so in distinct language, as in Rev. St. c. 144, § 34. A sentence to imprisonment elsewhere is not included as a cause of divorce, within the meaning of Pub. St. c. 146, § 2. Martin v. Martin, 47 N. H. 52, 53.

Libel dismissed.[35]

HOLLOWAY v. HOLLOWAY.

(Supreme Court of Georgia, 1906. 126 Ga. 459, 55 S. E. 191, 7 L. R. A. [N. S.] 272, 115 Am. St. Rep. 102, 7 Ann. Cas. 1164.)

COBB, P. J.[36] * * * The right of the libellant to a divorce results from the conviction and sentence. There are three essential ingredients in the ground for divorce; the commission of the offense

[35] Accord: Klutts v. Klutts, 5 Sneed (Tenn.) 423 (1858); Martin v. Martin, 47 N. H. 52 (1866). In a few states—e. g., Delaware, Indiana, Kentucky, Michigan, Minnesota, Nebraska, Pennsylvania, and Wyoming—the statutes expressly declare that a conviction and sentence in another state or country shall be ground for divorce. In a few states—e. g., Maine, Michigan, Rhode Island, and Wisconsin—the statutes declare that conviction of certain crimes shall work a dissolution of marriage without legal process. See extended note to State v. Duket, 90 Wis. 272, 63 N. W. 83, 48 Am. St. Rep. 928 (1895), in 31 L. R. A. 515, collecting the statutes of various states.

[36] Only that part of the opinion relating to the effect of a pardon is given. Question arose on a demurrer to the libel, stating a conviction of voluntary manslaughter, and sentence of twenty years, followed by a pardon. Demurrer was overruled, and respondent excepted.

involving moral turpitude, the conviction for the same, and a sentence for a term of two years or longer in the penitentiary. When this state of affairs is shown to exist, the law declares the libellant is entitled to a divorce. Can this right given by statute be destroyed by an executive pardon? The pardon restores the convict, so far as the public is concerned, to the position he occupied before the conviction. He is no longer infamous; he may vote, hold office, and perform other public functions. Rights which have accrued to individuals as a result of the conviction are not affected by the pardon.

Mr. Bishop in his work on Marriage, Divorce and Separation, §§ 444, 1807, says, that where conviction for a crime is declared to be a ground for divorce it is a defense to a divorce suit to show that the convict has been pardoned. He cites no authority for this statement. He does refer to the case of Young v. Young, 61 Tex. 191, where it was held that the commutation of the sentence of one convicted of a felony was not equivalent to a pardon. The statute of Texas provided that if a party to a marriage was convicted of a felony and imprisoned in a State prison, this should be a ground for divorce, provided that no suit could be maintained for the conviction of either party until twelve months after final judgment of conviction, nor then if the governor should have pardoned the convict. In that case the governor had commuted the sentence of the convict within twelve months after final judgment; and this was held not to amount to a pardon within the meaning of the statute.

Mr. Nelson in his work on Divorce and Separation says that it would seem that if before the trial of the suit for divorce the convict is pardoned, the divorce should not be granted. He cites no authority for the proposition. Reference is made to the case of Young v. Young, supra, and also to the case of State v. Duket, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. Rep. 928. In that case it was held that the reversal of a sentence of one convicted of a felony did not have the effect of restoring the conjugal rights taken away by virtue of a statute which declared that a sentence of imprisonment for life should dissolve the marriage of the person sentenced.

Mr. Keezer in his recent work on Marriage and Divorce says that no pardon granted after the decree of divorce will restore such party to his or her conjugal rights. To sustain this proposition he cites the case of Young v. Young, supra, and Handy v. Handy, 124 Mass. 394. In the case last cited the facts were peculiar, and it is impossible to tell from the meager statement in the report exactly what was the extent of the ruling.

We have been able to find no decision which is a direct ruling on the question now before us. We think the better view is that the

pardon of the convict does not destroy the right to a divorce, declared by statute to arise upon conviction and sentence.[37]

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(E) Subject Note on Miscellaneous Grounds for Divorce

Adultery, cruelty, desertion, and imprisonment are the most common and important grounds for divorce. But in many states divorces, either a vinculo or a mensa et thoro, are granted for other reasons. See Stimson, Am. Stat. Law, § 6201 (2), impotence; § 6201 (5), intoxication habit; § 6201 (6), nonsupport; § 6201 (8), disappearance of either party; § 6201 (10), joining a religious sect disbelieving in the marriage relation; § 6201 (13), for causes rendering the marriage originally void or voidable, e. g., incestuous marriage, bigamous marriage, mental incapacity, fraudulent marriage, antenuptial pregnancy, etc.; § 6201 (15), indefinite causes at discretion of the court; § 6201 (16), voluntary separation for a certain period; § 6201 (18), incurable insanity; § 6201 (19), concealment of a loathsome disease; § 6213, omnibus clauses, e. g., "for any misconduct as permanently destroys the happiness of petitioner and defeats the purpose of the marriage relation," "for any other cause deemed by the court sufficient, if satisfied that they can no longer live together," "for the habitual indulgence of a violent and ungovernable temper," etc. See, also, the following references: Note in 39 L. R. A. 262, at page 264 (1897), whether use of drugs comes within intoxication or cruelty clauses; note to Mohler v. Shank, 93 Iowa, 273, 61 N. W. 981, 57 Am. St. Rep. 274 (1895), in 34 L. R. A. 161, on insanity as a ground for divorce; note to Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34, 57 Am. St. Rep. 95 (1896), in 34 L. R. A. 449, on drunkenness as a ground for divorce; Page v. Page, 43 Wash. 293, 86 Pac. 582, 6 L. R. A. (N. S.) 914, 117 Am. St. Rep. 1054 (1906), who is an habitual drunkard; Griffeth v. Griffeth, 162 Ill. 368, 44 N. E. 820 (1896), and Jorden v. Jorden, 93 Ill. App. 633 (1901), definition of "impotence." Under the Kentucky statute, providing for a divorce where the parties have lived apart for five consecutive years next before the application, a divorce will be granted, though it appear that the separation was due to the fault of the party asking it, Clark v. Clark (Ky.) 53 S. W. 644 (1899), and the living apart is voluntary within the meaning of this statute, where the husband is imprisoned for life, since he is at fault, Davis v. Davis, 102 Ky. 440, 43 S. W. 168, 39 L. R. A. 403 (1897). Sodomy is a proper cause under the Washington statute (any cause deemed by the court sufficient). Poler v. Poler, 32 Wash. 400, 73 Pac. 372 (1903). But the mere fact that the parties quarrel and live together unhappily is not a cause un-

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[37] In several states—e. g., Arizona, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming—it is expressly provided that a pardon shall have no effect on the right to divorce. See statutes collected in 31 L. R. A. 515 (1895). While the principal case seems to be the only decision involving the precise question, where no statute controls, the principle involved—that the effect of the conviction on the marriage relation is determined by the original sentence—is supported by the following cases: Oliver v. Oliver, 169 Mass. 592, 48 N. E. 843 (1897), and Sargood v. Sargood, 77 Vt. 498, 61 Atl. 472 (1905), holding that, where the sentence is for a maximum term, an allowance for good behavior is to be disregarded. And see, also, State v. Duket, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. Rep. 928 (1895); Cone v. Cone, 58 N. H. 152 (1877); Handy v. Handy, 124 Mass. 394 (1878). See note to principal case in 7 Col. Law Rev. 54, entitled "Effect of Pardon on Divorce for Conviction of Crime."

der this statute. Stanley v. Stanley, 24 Wash. 460, 64 Pac. 732 (1901); Wheeler v. Wheeler, 38 Wash. 491, 80 Pac. 762 (1905). Failure to support is no ground for divorce, where the husband has not the means or ability to furnish support. Loring v. Loring, 17 Tex. Civ. App. 95, 42 S. W. 642 (1897); Freeman v. Freeman, 94 Mo. App. 504, 68 S. W. 389 (1904); Deneen v. McLeod, 21 C. S. 54 (Quebec 1901), inability due to insanity.

III. Special Defenses

(A) Collusion

THOMPSON v. THOMPSON.

(Supreme Court of Michigan, 1888. 70 Mich. 62, 37 N. W. 710.)

Bill for divorce. Decree dismissing bill affirmed. The facts are stated in the opinion.

Champlin, J. In this case the complainant filed his bill praying a divorce from the defendant, on the ground of cruel and inhuman treatment. He averred in his bill—

"That the acts done and cause of divorce charged in this bill of complaint, for which divorce is sought, were committed without the consent, connivance, privity, or procurement of your orator, and that such bill is not founded upon or exhibited in consequence of any collusion, agreement, or understanding whatever between the parties thereto, or between your orator and any other person."

Section 6232, How. Ann. St., provides:

"No divorce shall be decreed in any case when it shall appear that the petition or bill therefor was founded in or exhibited by collusion between the parties, nor where the party complaining shall be guilty of the same crime or misconduct charged against the respondent."

The bill of complaint was taken as confessed by the defendant after personal service of subpœna upon her.

After testimony had been taken before a commissioner, the court ordered the complainant to appear personally before the court, and give testimony in the cause. From his testimony it appears that, before the bill was filed, complainant made offers to his wife to get her to release all interest in his property. He testified:

"I told her I would not pay her the $500 unless she would get a divorce, or let me,—I did not care which; that I was going to have, and have things solid, or I would not pay anything; that I was going to get clear if I paid that much. I told her if she would make out the writings that way, so that I could get a divorce, or she could,—I did not care which,—I would pay her the $500 just as she wanted it. She wanted I should get the divorce if I paid her for it. She did not want any. I told her I would not pay unless I got one."

After this she executed a quitclaim deed, and signed an agreement, set out in full in the record, as follows:[38] * * *

Complainant then paid her $500, and filed his bill in this cause.

The circuit court dismissed the bill of complaint, and complainant appeals.

His counsel claims that the statute only refers to that class of cases where parties, without any cause for a divorce, agree together collusively to obtain a decree; and that in this case the testimony shows that complainant had a legal cause for divorce.

We do not feel called upon to decide whether the complainant had a legal cause for divorce under the testimony. The agreement made was in contravention of the statute. It is immaterial whether complainant had cause for divorce or not. The statute is based upon public policy, which forbids the annulment of the marriage contract by the agreement of the parties. Such an agreement is collusive, and a fraud upon the court, which requires a positive averment that the bill of complaint is not exhibited in consequence of any collusion, agreement, or understanding whatever between the parties thereto. Chancery rule 95.

The decree of the circuit court is affirmed.[39]

SHERWOOD, C. J., and MORSE and LONG, JJ., concurred. CAMPBELL, J., did not sit.

[38] The text of the agreement is omitted. After reciting that husband and wife had separated in consequence of mutual disagreements and had agreed to live apart, it provided that the wife was to receive $500 in lieu of dower and other interest in the husband's property, that she was to support herself, contract no debts for which the husband should be liable, and, in case he sued for divorce, that "she will put him to no additional costs therein, and make no claim for allowance, alimony, or maintenance in said divorce proceedings."

[39] Accord: Barnes v. Barnes, L. R. 1 Prob. & Div. 505 (1868), semble; Lloyd v. Lloyd, 1 Swab. & T. 567 (1859); Butler v. Butler, 15 Prob. Div. 66 (1890). But see Harris v. Harris, 4 Swab. & T. 232 (1862). An agreement to institute divorce proceedings for a cause which does not exist is collusive, even though there may be some other cause. Stokes v. Anderson, 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313 (1888). The fact that one, or even both, the parties believe the agreement to be free of legal or moral wrong, is immaterial. Branson v. Branson, 76 Neb. 780, 107 N. W. 1011 (1906). Collusion implies concerted action; hence a concealment of material facts by one party is not collusion. Hunter v. Hunter, [1905] Prob. Div. 217. It is not collusion for the husband to make the wife a reasonable allowance while suit is pending, in order to save the expense of an application for alimony. Barnes v. Barnes, L. R. 1 Prob. & Div. 505 (1868). In Doeme v. Doeme, 96 App. Div. 284, 89 N. Y. Supp. 215 (1904), it was held that the fact that the wife makes a provision for the husband's future support is not a badge of fraud or collusion, or even a suspicious circumstance requiring investigation. For good general discussion, see Churchward v. Churchward, [1895] Prob. Div. 7; Griffiths v. Griffiths, 69 N. J. Eq. 689, 60 Atl. 1090 (1905).

TODD v. TODD.

(Court of Probate and Divorce, 1866. L. R. 1 P. & D. 121.)

THE JUDGE ORDINARY.[40] I feel constrained to come to the conclusion that this is not a case in which the Court can give relief, because the parties have been acting together in collusion. * * * From this testimony I have come to the following conclusions of fact: That, when Mr. Todd came to Europe, although personally he kept free from all communication with his wife, he did, through the agency of his sister, manage to communicate to her that he was going to Paris; that, having promised to give her an opportunity of getting a divorce when he got rich, he went to Paris, informing her of the address to which he was going, for the express purpose of fulfilling the promise; and that, in giving her that address, he intended that she should obtain evidence of the act of adultery he was about to commit. I conclude also that she was consenting to this state of things. And I think, in short, that she and her husband were acting in concert together, that the arrangement between them was, that he was to commit adultery in order that she might obtain a divorce, and that he was to give her the address where he was going to commit adultery, in order that she might obtain evidence of it. She failed to obtain the necessary evidence on the first occasion, although he may probably have committed adultery, for he says in one of his letters that he has done all that is required.

Having come to that conclusion as to the previous transactions, in what light am I to regard the subsequent transactions at Spa and at Paris? The conclusion I have arrived at is, that his second visit to Paris was made for the express purpose of committing adultery, and of being detected. And whether anything passed openly between him and young Mr. Mardon to shew that the latter was at Spa for the purpose of watching him or not, I am satisfied that Mr. Todd, in taking this stranger to live with him in the way that has been described, knew that he was the person who was to give the necessary evidence, and entered into that close communication with him for the purpose of enabling him to give that evidence.

[His Lordship referred to the thirtieth section of the Divorce Act of 1857 (20 and 21 Vict. c. 85), and to the case of Lloyd v. Lloyd & Chichester, 1 Sw. & Tr. 567, 30 L. J. (P. M. & A.) 97, and then said:]

It is extremely difficult to define collusion, or to describe it by any periphrasis, nor do I propose to do so. But it seems to me that where, as in this case, the husband has promised the wife to commit adultery in order that she may obtain a divorce, and she has consented, as I find that she has done, to take the course indicated to her by the husband, namely, that of watching him in order to obtain evi-

[40] Only the opinion is given. The reference to the evidence is omitted.

dence of his adultery, and where the adultery charged has been committed with that understanding between the parties, and the evidence has been obtained by that means, it is impossible to say that the parties have not been colluding together and playing into one another's hands in presenting the petition and prosecuting the suit. Having come to that conclusion it is my duty to dismiss the petition and I do so accordingly.[41]

(B) Connivance

NOYES v. NOYES.

(Supreme Judicial Court of Massachusetts, 1907. 194 Mass. 20, 79 N. E. 814. 120 Am. St. Rep. 517, 10 Ann. Cas. 818.)

Libel, filed November 16, 1904, for divorce on the ground of adultery alleged to have been committed with one Dodge.

The answer contained a general denial, and alleged condonation and connivance. * * *

The judge ordered that the libel be dismissed. To this order and to the ruling stated above the libellant alleged exceptions.[42]

HAMMOND, J. The trial judge found that the libellant arranged, as stated in his testimony which is recited in the bill of exceptions, with one Dow that an opportunity should be afforded the libellee by permitting her and the co-respondent to pass the evening of November 5 alone in Dow's house, without interference and interruption by other persons, although such permission had theretofore on the morning of the preceding day been refused the libellee by Mrs. Dow, and having so found, "ruled as matter of law that the facts so found were connivance on the part of the libellant." He thereupon ordered that the libel be dismissed, "and to the rulings aforesaid and said order the libellant duly excepted." In an amendment to the bill it is stated that the finding was made only upon the evidence recited in the bill.

It is contended by the libellant that the only question arising on the record is whether the testimony of the libellant, which is the only testimony reported, shows as matter of law connivance; but we do

[41] But the fact that one spouse commits adultery, for the purpose of affording grounds for a divorce, does not bar the other's right to a divorce, where the commission of the offense is not the result of concerted action. Crewe v. Crewe, 3 Hagg. Ecc. 123 (1800). In Cowan v. Cowan, 23 Misc. Rep. 754, 53 N. Y. Supp. 93 (1898), plaintiff sent her son to inform her husband that she desired a divorce, the husband committed adultery to furnish a ground for the action, and the son informed plaintiff of the facts: held, a divorce will be denied, though plaintiff was ignorant of the collusion between the son and defendant.

[42] Part of the statement is omitted, as the facts are sufficiently stated in the opinion.

not so interpret the record. The only ruling made was that certain facts found by the trial court constituted in law connivance, and the question whether the evidence warranted the finding does not seem to have been raised. The evidence upon which the finding was made was circumstantial to a certain extent; and according to the relative degree of credit to be given to the libellant's denials of inferences which might be drawn against him from the facts stated by him, the finding might be either way. The judge evidently placed more reliance upon the legitimate inferences from the facts stated by the witness than he did upon the denial of the inferences. The witness was before him, and as he went on the judge had an opportunity by observing him to test his sincerity in his denials.

Even if the question whether the finding is sustained by the evidence is before us, we are of the opinion that it is so sustained. The evidence warranted the finding that the libellant desired that on the night in question his wife should commit adultery, or at least that she should be placed in such a compromising position as to lead to the inference of the committal of that act; that he desired to do this so that he might get a divorce and be freed from her and his real estate be free from any claim on her part; that Mrs. Dow, who was to be away, had refused the libellee the use of the house for that evening; that the libellant knew it and feared that Dow might be at home; and that the libellant's purpose in seeing Dow was to induce him to stay away, not only that a crime, if committed, might be detected, but that it might be committed; and that in that way, by active exertion, he aided in procuring the house for an adulterous use by his wife, when otherwise she would not have had it. In other words, the evidence warranted the finding made by the judge that the libellant arranged with Dow that the house should be used by his wife without interference or interruption on the part of other persons, although such permission had been refused by Mrs. Dow. Under the circumstances of the case this must be held to be a finding that the libellant did this to facilitate the committal of adultery by his wife.

Was such an act as matter of law connivance on the part of the libellant? The law upon this subject was quite fully considered by this court in Wilson v. Wilson, 154 Mass. 194, 28 N. E. 167, 12 L. R. A. 524, 26 Am. St. Rep. 237, Morton, J., speaking for the court, uses the following language: "Merely suffering in a single case a wife whom he already suspects of having been guilty of adultery to avail herself to the full extent of an opportunity to indulge her adulterous disposition, which she has arranged without his knowledge does not constitute connivance on the part of the husband, even though he hopes he may obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason. He may properly watch his wife whom he suspects of adultery, in

order to obtain proof of that fact.[43] He may do it with the hope and purpose of getting a divorce if he obtains sufficient evidence. He must not, however, make opportunities for her, though he may leave her free to follow opportunities which she has herself made. He is not obliged to throw obstacles in her way, but he must not smooth her path to the adulterous bed. 2 Bish. Marriage & Divorce (5th Ed.) § 9; Timmings v. Timmings, 3 Hagg. Eccl. 76; Stone v. Stone, 1 Rob. Eccl. 99, 101; Phillips v. Phillips, 10 Jur. 829."

Applying the law to the findings of the court as interpreted by the issues on trial, it is clear that the ruling that as matter of law the facts show connivance was correct. By his arrangement with Dow the libellant assisted his wife on "her path to the adulterous bed." It is immaterial that she was unaware of this assistance. As additional cases bearing upon the law of connivance, see Morrison v. Morrison, 136 Mass. 310; Robbins v. Robbins, 140 Mass. 528, 5 N. E. 837, 54 Am. Rep. 488.

Exceptions overruled.[44]

[43] Accord: Reiersen v. Reiersen, 32 App. Div. 62, 52 N. Y. Supp. 509 (1898); Warn v. Warn, 59 N. J. Eq. 642, 45 Atl. 916 (1899); Brown v. Brown, 62 N. J. Eq. 29, 49 Atl. 589 (1901), reversed on the evidence in 63 N. J. Eq. 348, 50 Atl. 608 (1901); Tuck v. Tuck, 117 App. Div. 421, 102 N. Y. Supp. 688 (1907).

[44] Accord: Karger v. Karger, 19 Misc. Rep. 236, 44 N. Y. Supp. 219 (1897); May v. May, 108 Iowa, 1, 78 N. W. 703, 75 Am. St. Rep. 202 (1899); Torlotting v. Torlotting, 82 Mo. App. 192 (1899). So, also, a husband cannot obtain a divorce for the wife's adultery, where he deserted her in a large city, with but a trifling sum to provide for her wants. Heidrick v. Heidrick, 22 Pa. Super. Ct. 72 (1902). And see Moore v. Moore, 102 Tenn. 148, 52 S. W. 778 (1899). In Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34, 34 L. R. A. 449, 57 Am. St. Rep. 95 (1896), where the wife directed her attorneys to employ detectives to procure evidence, and the detectives hired a lewd woman to lure the husband into an act of adultery, the wife's suit was held to be barred on the ground of connivance, even though she may not have expressly directed employment of the woman. See, also, to same effect, Gower v. Gower, L. R. 2 Prob. & Div. 428 (1872). In Woodward v. Woodward, 41 N. J. Eq. 224, 4 Atl. 424 (1886), and Lovering v. Lovering, 3 Hagg. Ecc. 85 (1792), it was held that a husband who connives at one act of adultery can not object to a subsequent act. Contra: Viertel v. Viertel, 99 Mo. App. 710, 75 S. W. 187 (1903). But connivance at one act of adultery will not bar divorce for an earlier act. Millard v. Millard, 78 Law Times (N. S.) 471 (1898); Viertel v. Viertel, supra; Bailey v. Bailey, 67 N. H. 402, 29 Atl. 847 (1892); Morrison v. Morrison, 142 Mass. 361, 365, 8 N. E. 59, 56 Am. Rep. 688 (1886). The latter case, however, says that the character of this connivance may be so open and revolting as to indicate that the husband is not injured even by a prior act not expressly consented to.

(C) Condonation

SHACKLETON v. SHACKLETON.

(Court of Chancery of New Jersey, 1891. 48 N. J. Eq. 364, 21 Atl. 935, 27 Am. St. Rep. 478.)

VAN FLEET, V. C. This is a suit by a wife against her husband for divorce. The charge is adultery. The husband's guilt is proved. There is no difficulty on that score, but the case nevertheless presents a debatable question, and that is, whether all the wrongs on which the complainant's right of action rests have not been pardoned?

The parties were married in August, 1867. They have five children. They all live with their mother. The proofs show that the defendant induced another woman, by falsely representing himself to be a single man, to enter into a contract of marriage with him, in November, 1881, and that he and she, from that date on until April, 1889, lived together as husband and wife. During the same period the defendant also lived with the complainant as his wife. He, however, spent the greater part of his time with the other woman. His adulterous intercourse with her extended over a period of more than seven years. In April, 1889, this other woman brought a suit for divorce against the defendant, for adultery, in the superior court of the city of New York. He was then a citizen of this state, and notice of that suit was given to him by publication in a New York newspaper. The complainant saw that publication soon after it was made, and she admits that it led her to suppose that the defendant had lived with this woman as his wife. She did not see the defendant, after the publication came to her knowledge, until the 29th day of May following. She then accused him with having committed adultery with this woman. He assured, her, with great earnestness, that the charge was false, and told her that if she would go with him to his lawyer and to one of his employers, he could satisfy her of his innocence. She says she told him that she believed him to be guilty, notwithstanding his protestations of innocence, and also that she would never forgive him. She admits that the truth is that she believed he was guilty in spite of his denials. And she frankly confesses that she had sexual intercourse with him during the night of the day on which this conversation occurred. Her evidence shows that it was voluntary. He went to bed first, she entered the same bed shortly afterward, and there the intercourse occurred. He left her the next morning and did not return until after this suit was brought. The complainant's bill was filed June 7th, 1889. The important question which this condition of facts raises is, did the complainant, by allowing the defendant to have sexual intercourse with her, on May 29th, condone all his adulteries?

The law is settled that a wife, by voluntarily having sexual intercourse with her husband, after she knows that he has committed adultery, and that she can prove it, thereby pardons his offence. 2 Bish. Mar. & D. § 43; Quincy v. Quincy, 10 N. H. 272, 274. Such act necessarily implies forgiveness. A husband by committing adultery violates one of the most sacred duties imposed upon him by the marriage contract, and by his wrong forfeits all his rights under the contract. By his infidelity he puts it in the power of his wife to have the bond which binds her to him dissolved; it is, therefore, entirely consonant with both reason and justice that if she freely consents to sexual intercourse, after she has full knowledge of his guilt, that her consent should operate as a pardon of his wrong. But condonation in such cases is always conditional and limited; the party forgiven must, to retain the benefit of the pardon, treat the other, in the future, with conjugal kindness and fidelity; and, as a general rule, the pardon extends only to such offences as are known to the pardoning party when the intercourse occurs. With regard to the limitation of this rule, Bishop says: "Alike, in reason and in law, forgiveness cannot take place without a knowledge of the existence of the thing to be forgiven, so that such knowledge is one of the elements of every presumed condonation." 2 Bish. Mar. & D. § 38. An instructive example of the manner in which this principle is applied, is given in Alexandre v. Alexandre, L. R. 2 Pro. & Div. 146. A husband brought a suit against his wife for divorce, on the ground of adultery. The parties were married in January, 1856, and lived together for a short time thereafter and then separated, and did not resume cohabitation until March, 1868. After resuming cohabitation they remained together for only a few weeks. The husband then brought his suit. While they were separated, the wife had a child by another man—it was born in 1860—and after the birth of the child, and before they resumed cohabitation, the wife committed other adulteries. While the negotiations looking to a restoration of conjugal relations were going on, the wife confessed the adultery which resulted in the birth of the child, but concealed those subsequently committed. The question was whether the husband had not, by taking his wife back under the circumstances stated, condoned all her offences, but the court held that the offences committed subsequent to the birth of the child had not been condoned, because it could not be presumed that the husband had forgiven wrongs that he did not know had been committed.

The doctrine that the pardon implied from sexual intercourse shall extend only to offences known to the pardoning party when the intercourse occurs, is no less a dictate of sound reason than of justice. Willingness to forgive a single offence, or even a series of offences, committed under circumstances of strong temptation, would not give the least support to a presumption that the injured party, if he or she knew the whole truth, would forgive a long course of

profligacy. Forgiveness may be so expressed, certainly by words, and possibly also by conduct without words, as to show that the injured party means to blot out the whole past and to forgive everything, both offences known and unknown, but in no case should the court so adjudge, as against an injured wife, except the proofs show very clearly that such was her purpose. The question whether a matrimonial offence has been condoned or not, is always one of intention, and where a wife is the injured party, and her husband claims the benefit of a pardon, and rests his claim on nothing but an implication arising out of her conduct, the court should be extremely careful not to absolve him from the consequences of a wrong which his wife never intended to forgive. It must be remembered that she is the weaker party, and always more or less under the influence of her husband, and that in many cases her chief means of inducing her husband to perform his duties toward her cheerfully and generously, is by yielding to his wishes and trying to please him. A prudent wife, unless her husband is a craven, will always coax rather than attempt to coerce him.

The rule that pardon may be implied from sexual intercourse, is not enforced so rigorously against a wife as it is against a husband. The reasons why this is so are obvious. They were stated by Lord Stowell as follows: "A woman has not the same control over her husband, has not the same guard over his honor, has not the same means to enforce the observance of the matrimonial vow; his guilt is not of the same consequence to her (D'Aguilar v. D'Aguilar, 3 Eng. Eccl. Rep. 329, 337); she is more sub potestate, more inops consilii; she may entertain more hopes of the recovery, and reform of her husband; her honor is less injured and is more easily healed. * * * It is not improper that she should for a time show a patient forbearance. * * * Weakness in her is pardonable in many circumstances." Beeby v. Beeby, 3 Eng. Eccl. Rep. 338, 340. Notwithstanding the radical changes which, during the last forty years, have been made in the law respecting the property rights of married women, the husband is still, in many respects, the ruler and his wife his subject. Her position is still one of obedience, and when she has no separate estate it is also one of dependence. That is the case here. The complainant, when the intercourse occurred which the defendant claims operated as a pardon, was entirely without means and wholly dependent on the defendant for everything.

The principles above stated must control the decision in this case. And they make it clear, as I think, that the complainant is entitled to a decree. The legal effect of the sexual intercourse which she had with the defendant on May 29th was to condone only such offences as she then knew he had committed. She did not then know that he had committed adultery. She says, it is true, that she believed he had, but her belief, it is manifest, was the product of suspicion and not of evidence. Nothing up to that time had come to her knowledge,

so far as the evidence shows, which was sufficient to have induced a loyal wife to believe that her husband had committed adultery. All she had heard up to that time was what the newspaper had told her. That was sufficient, undoubtedly, to excite her fears and create suspicion, but it was not evidence, nor even such information as should have induced her to start at once, and before she had given her husband an opportunity to defend himself, in pursuit of information against him. It is the duty of a wife to be loyal to her husband; she must cling to him closer in adversity than in prosperity; believe in him when others doubt; stand by him when every other friend deserts him; defend him against all assailants; and she must be the last person to believe a report tending to disgrace or dishonor him. Knowledge of what the newspaper disclosed did not, in my judgment, impose upon the complainant the duty of going at once in search of evidence against her husband, and so making her chargeable with all the knowledge that she might thus have acquired; on the contrary, I think it was her duty to desist from inquiry until she had given him an opportunity to defend himself. That was the course she pursued.

The fact is, that when the complainant had the intercourse with the defendant, which he now attempts to use as a shield against the consequences of a life of profligacy extending over more than seven years, she could not prove that he had committed a single act of adultery; much less did she know that he had made the same solemn vows of love and loyalty to another woman that he had made to her. She had heard enough to make her suspect that he had been unfaithful to her, but it is entirely certain that she did not know either the extent or the atrocious character of his misconduct. To impute such knowledge to her by presumption would, as it seems to me, be contrary to the lowest notions of justice; the presumption should, according to both reason and justice, be the other way; for, I think there can be no doubt whatever, that had the complainant known the whole truth on May 29th—the full extent of the defendant's apostacy to her—that instead of going to the bed where he lay and submitting to his embraces, she would have fled from him as a polluted being. The fact that she brought this suit, within less than ten days after he turned his back upon her, shows that she did not submit to his embraces because she was indifferent to her rights, or insensible to injury. The complainant is entitled to a decree.

The defendant is also before the court on an order to show cause why he should not be adjudged guilty of contempt for disobeying an order requiring him to pay alimony. The proofs are not sufficient to support an order declaring that he has been guilty of willful disobedience, and the order to show cause must, therefore, be discharged.[45]

[45] See, also, the following cases to the effect that condonation is based upon a full knowledge of the offense and that mere suspicion is not enough: Bramwell v. Bramwell, 3 Hagg. Ecc. 618 (1831); Quincy v. Quincy, 10 N. H. 272 (1839); Welch v. Welch, 50 Mo. App. 395 (1892); Gosser v. Gosser, 183

ROBBINS v. ROBBINS.

(Supreme Judicial Court of Massachusetts, 1868. 100 Mass. 150, 97 Am. Dec. 91.)

GRAY, J.[46] * * * The law is settled in this Commonwealth, in accordance with the doctrine declared by Lord Stowell and Sir John Nicholl in the English ecclesiastical courts, that any condonation by the wife of her husband's cruelty is on the implied, if not expressed, condition of his treating her in the future with conjugal kindness; that any breach of this condition will revive the right to maintain a libel for the original offence; and that such a breach may be shown by acts, words or conduct which would not of themselves prove a cause of divorce. Harshness or rudeness, not sufficient to maintain a libel, may receive a different interpretation and effect upon the question of condonation, after proof that the husband has previously gone to the length of positive acts of cruelty. Gardner v. Gardner, 2 Gray, 441, 442; D'Aguilar v. D'Aguilar, 1 Hagg. Eccl. 782; Durant v. Durant, Id. 763; Westmeath v. Westmeath, 2 Hagg. Eccl. (Suppt.) 114.

In the case before us, the testimony was that for the period of six weeks, beginning only a fortnight after the last act of extreme cruelty proved, the husband, while living in the same house with his wife, wholly and continuously refused to speak to her. Such evidence of

Pa. 499, 38 Atl. 1014 (1898); Harris v. Harris, 83 App. Div. 123, 82 N. Y. Supp. 568 (1903). But condonation may cover unknown acts, if so intended. Moorhouse v. Moorhouse, 90 Ill. App. 401 (1900). If the wife believes her husband's denial, even though a third party would not, her subsequent conduct is not condonation. Andros v. Andros, 1 Cal. App. 309, 82 Pac. 90 (1905). See the following, also, to the effect that condonation is not so readily established against the wife as against the husband: D'Aguilar v. D'Aguilar, 1 Hagg. Ecc. 773 (1794); Beeby v. Beeby, 1 Hagg. Ecc. 789 (1799); Wood v. Wood, 2 Paige (N. Y.) 108 (1830); Bowie v. Bowie, 3 Md. Ch. 51 (1850); Armstrong v. Armstrong, 32 Miss. 279 (1856); Clague v. Clague, 46 Minn. 461, 49 N. W. 198 (1891). In Rogers v. Rogers, 67 N. J. Eq. 534, 58 Atl. 822 (1904), it was held that sexual intercourse amounted to condonation, even though the offense was not forgiven. In California condonation must, by statute, be by express agreement, cohabitation alone not being sufficient. Hunter v. Hunter, 132 Cal. 473, 64 Pac. 772 (1901). Where the wife after knowledge of the offense continues to live with the husband, but denies him marital rights, there is no condonation. Mattes v. Mattes, 121 Ill. App. 400 (1905); Lindsay v. Lindsay, 226 Ill. 309, 80 N. E. 876 (1907). On condonation of loathsome diseases, see Hooe v. Hooe, 122 Ky. 590, 92 S. W. 317, 13 Ann. Cas. 214 (1906), reported with note in 5 L. R. A. (N. S.) 729.

[46] Both husband and wife filed libels for divorce a vinculo. Foster, J., at trial, found "that, although the conduct of the wife showed condonation on her part of the specific acts of personal violence, yet that the husband's persistent refusal to speak to her for six weeks was a violation on his part of the implied condition of future kind treatment, upon which the condonation was based, and was such misconduct as justified the wife in leaving his house, that the husband's libel must be dismissed, and that the wife was entitled to a decree." The statement of facts is omitted and only so much of the opinion is given as relates to the point of condonation.

persistent and enduring unkindness and ill temper warranted the wife or the court in inferring that his smothered anger would break out again into acts of cruelty.

Divorce granted to the wife.[47]

(D) Recrimination

CLAPP v. CLAPP.

(Supreme Judicial Court of Massachusetts, 1867. 97 Mass. 531.)

CHAPMAN, J.[48] The libellant seeks to obtain a divorce from his wife on the ground that she deserted him on the 5th of April, 1860, and continued the desertion for five years and more. She proves in defence, that before the lapse of the five years, namely, on the 25th of April, 1864, the libellant married another woman, and occupied the same house and bed with her for several days. This is sufficient evidence to prove adultery on his part.

1. He replies to this evidence, that his adultery is no defence, because her offence is of a different character; and he contends that she cannot recriminate his delictum unless it is an offence of the same kind, and not of a different character. Some authorities are cited to sustain this point. But the offence of each of them was of such a character as would by our statutes entitle the other party, if not in fault, to a divorce from the bonds of matrimony. In that respect, the offences were alike. The court had occasion to consider the validity of such a defence in Hall v. Hall, 4 Allen, 39. It was there held that where a wife has deserted a husband for a period of five years, so

[47] It is clear that a condoned offense is revived by the commission of the same kind of offense. Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298 (1898); Moorhouse v. Moorhouse, 90 Ill. App. 401 (1899), semble; Edleman v. Edleman, 125 Wis. 270, 104 N. W. 56 (1905); Harding v. Harding, 36 Colo. 106, 85 Pac. 423 (1906); Clark v. Clark, 191 Mass. 128, 77 N. E. 702 (1906); Mosher v. Mosher, 16 N. D. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. Rep. 654 (1907). Also that a condoned offense is revived by the commission of a different offense. Copsey v. Copsey, 20 Times Law R. 728 (1904), condoned adultery revived by desertion; Fisher v. Fisher, 93 Md. 298, 48 Atl. 833 (1901), condoned adultery revived by cruelty. Likewise a condoned offense is revived by conduct which causes a reasonable apprehension of the commission of the same or a similar offense. Totten v. Totten (N. J. Ch.) 60 Atl. 1095 (1905); Apgar v. Apgar (N. J. Ch.) 59 Atl. 230 (1904); Cochran v. Cochran, 93 Minn. 284, 101 N. W. 179 (1904); Abbott v. Abbott, 192 Ill. 439, 61 N. E. 350 (1901). It is intimated in the last-named case that nothing less will revive the condoned offense. In Brown v. Brown, 129 Ga. 246, 58 S. E. 825 (1907), it was said without discussion that condoned cruelty will be revived only by fresh acts of cruelty. In Ellithorpe v. Ellithorpe (Iowa) 100 N. W. 328 (1904), it was said that a husband could not rely on condonation of his offense, where he kept his promise of future conjugal kindness only while he slept, resuming his abuse the following day with additional meanness.

[48] Only part of the opinion is given. It sufficiently states the facts.

that he would be entitled to a divorce against her on that ground, she cannot maintain a libel against him on the ground of his adultery after the lapse of the five years; but she may maintain it if he has committed adultery within the five years and before her offence is complete. This doctrine stands on the obviously just ground stated in Hope v. Hope, 1 Swab. & Trist. 107, where it is said that "a party guilty of a breach of the marriage vow should not have the assistance of the court to enforce any marital right." At the time when the libellant committed his offence, a locus penitentiæ remained to the wife, and she might have returned to him. His offence justified her in never returning. * * *

Libel dismissed.[49]

BAST v. BAST.

(Supreme Court of Illinois, 1876. 82 Ill. 584.)

Appeal from the Superior Court of Cook County; Hon. Samuel M. Moore, Judge, presiding.

BREESE, J. The grounds alleged for reversing the decree in this case are, that the decree is not sustained by the evidence, and that appellee himself had deserted his wife, giving to her the right to claim a divorce from him. We do not think his desertion can exonerate the wife from the more serious charge of adultery. Neither that, nor drunkenness, nor cruelty, will, under our statute, constitute a sufficient

[49] See, to the effect that neither can obtain a divorce where both are guilty of the same offense, Amy v. Berard, 49 La. Ann. 897, 22 South. 48 (1897), cruelty; Duberstein v. Duberstein, 171 Ill. 133, 49 N. E. 316 (1897), cruelty; Lenning v. Lenning, 73 Ill. App. 224 (1898), adultery; Shoup v. Shoup, 106 Ill. App. 167 (1903), cruelty; Stoneburner v. Stoneburner, 11 Idaho, 603, 83 Pac. 938 (1906), semble, desertion; Strickland v. Strickland, 80 Ark. 451, 97 S. W. 659 (1906), cruelty; Hartwell v. Hartwell, 25 Utah, 41, 69 Pac. 265 (1902), cruelty. The following hold that divorce should be denied, even though the offenses are different and may not be of the same grade of moral turpitude: Hugo v. Hugo, 21 Pa. Co. Ct. R. 607 (1898); Malone v. Malone, 76 Ark. 28, 88 S. W. 840 (1905); Day v. Day, 71 Kan. 385, 80 Pac. 974, 6 Ann. Cas. 169 (1905); Cassidy v. Cassidy, 63 Cal. 352 (1883); Alexander v. Alexander, 140 Ind. 555, 38 N. E. 855 (1894). In Bohan v. Bohan (Tex. Civ. App.) 56 S. W. 959 (1900), held that, while the offense used in recrimination need not equal that of defendant, it must be of the same general character. In many states statutes declare what offenses may be used in recrimination. Stim. Am. St. Law, §§ 6202, 6217. In G. v. G., 67 N. J. Eq. 30, 56 Atl. 736 (1903), a statute declaring that, when each party is guilty of adultery, neither shall have a decree, was held not to apply to a case where plaintiff charged adultery and defendant charged impotence; hence both entitled to a decree. The following cases hold that conduct resulting from defendant's wrong can not be used by defendant in recrimination: Prather v. Prather, 99 Iowa, 393, 68 N. W. 806 (1896), wife's cruelty result of seeing husband commit an unnatural crime; Fitzpatrick v. Fitzpatrick, 21 Misc. Rep. 378, 47 N. Y. S. 737 (1897); Setzer v. Setzer, 128 N. C. 170, 38 S. E. 731, 83 Am. St. Rep. 666 (1901), husband's adultery due to fact that wife's cruelty drove him away; Constantinidi v. Constantinidi, [1903] Prob. 246, husband's adultery due in part to wife's conduct.

recriminatory defense to a charge of adultery. Had appellee been guilty of a like offense, he could not claim a divorce.

As to the testimony in all such cases it must generally be circumstantial. The fact of adultery is to be inferred from circumstances that naturally lead to it by a fair inference as a necessary conclusion. The direct fact of adultery can seldom, or ever, be proved. We think sufficient facts were proved in this case "to lead the minds of reasonable and just men" to the conclusion established by the verdict, and we have no disposition to disturb it.

The decree must be affirmed. Decree affirmed.[50]

CUSHMAN v. CUSHMAN.

(Supreme Judicial Court of Massachusetts, 1907. 194 Mass. 38, 79 N. E. 809.)

Exceptions from Superior Court, Middlesex County; John A. Aiken, Judge.

Libel for divorce by one Cushman against one Cushman. Judgment dismissing the libel, and libelant excepted. Exceptions sustained.

HAMMOND, J. To a libel of the wife for divorce on the ground of adultery the husband filed an answer denying the adultery and setting up by way of recrimination prior desertion on the part of the wife. At the trial the judge found that the husband was guilty of the adultery, but as to the charge of desertion he did not find that the wife's conduct amounted to desertion, although he did find "that there was on her part such unmindfulness of marital obligations as to preclude the granting of her libel," and ordered it to be dismissed. In other words, the wife's charge of adultery was sustained but the husband's charge of desertion was not.

However it may be elsewhere, the rule in this commonwealth is that while the offense set up in recrimination need not be of the same nature as the one relied upon in the libel, yet it must be such as in law would be of itself sufficient ground for divorce. Hall v. Hall, 4 Allen, 39; Clapp v. Clapp, 97 Mass. 531; Watts v. Watts, 160 Mass. 464, 36 N. E. 479, 23 L. R. A. 187, 39 Am. St. Rep. 509; Walker v. Walker, 172 Mass. 82, 51 N. E. 455, and cases there cited. If upon the evidence the judge had found desertion then, the dismis-

[50] Accord: Stiles v. Stiles, 167 Ill. 576, 47 N. E. 867 (1897), semble; Abshire v. Hanks, 119 La. 425, 44 South. 186 (1907). The Illinois statute provides that, if it shall appear to the satisfaction of the court that both parties have been guilty of adultery, when adultery is the ground of complaint, then no divorce shall be decreed. Held, under this statute, in a suit on the ground of cruelty, adultery can be used as a bar. Decker v. Decker, 193 Ill. 285, 61 N. E. 1108, 55 L. R. A. 697, 86 Am. St. Rep. 325 (1901). But see Buerfening v. Buerfening, 23 Minn. 563 (1877), where, under a similar statute, it was held that adultery can be used by way of recrimination only where the suit is on the ground of adultery.

sal of the libel would have been correct; but he did not find it, and there is nothing in the facts found by him as to the conduct of the wife which estopped her from a divorce on the ground of the husband's adultery. This case does not belong to the class of which Lyster v. Lyster, 111 Mass. 327, is a type, where the libelee attempts to justify the charge alleged in the libel (in that case it was desertion) by showing misconduct on the part of the libelant which, though not sufficient in law to constitute a ground of divorce may yet be sufficient in law to justify the act relied upon in the libel. Watts v. Watts, ubi supra. In the case before us a separate and distinct offense on the part of the libelee, having no relation to the offense charged, is set up as a bar to the libel. In such a case, as has been before stated, the offense set up must be sufficient of itself to constitute a ground of divorce.

Exceptions sustained.[51]

STORMS v. STORMS.

(Court of Chancery of New Jersey, 1906. 71 N. J. Eq. 549, 64 Atl. 700.)

Suit by Jennie Storms against William F. Storms. On petition and cross-petition for divorce. Petition dismissed. Cross-petition granted.

EMERY, V. C.[52] * * * The petitioner being found guilty of adultery, the further question arises whether under the statute a divorce can be granted to the husband, who has himself been guilty of adultery, although this has been condoned. The language of the statute (Divorce Act, Revision 1902; P. L. p. 509, § 22) is: "If it appear to the court that the adultery complained of shall have been occasioned by the collusion of the parties and done with an intention to procure a divorce (or that the complainant was consenting thereto), or that both parties have been guilty of adultery, then no divorce shall be decreed." The original divorce act of December 2, 1794 (Patterson's Laws, p. 143), contained this clause, and it has since been included as a separate clause in all of the divorce acts. The question is one of statutory construction, and is simply whether "guilty of adultery" in the act means "committed adultery," or whether it means "guilty of" or "chargeable with" adultery, under the

[51] Accord: Bailey v. Bailey, 67 N. H. 402, 29 Atl. 847 (1893); Rudd v. Rudd, 66 Vt. 91, 28 Atl. 869 (1894); McCannon v. McCannon, 73 Vt. 147, 50 Atl. 799 (1901); Walker v. Walker, 172 Mass. 82, 51 N. E. 455 (1898). Contra: Deisler v. Deisler, 59 App. Div. 207, 69 N. Y. Supp. 326 (1901), semble. Fact that plaintiff in a previous suit for divorce committed perjury is no bar to his present suit. Conner v. Pozo, 114 La. 562, 38 South. 454 (1905).

[52] Only part of the opinion is given.

divorce act. If an adultery be condoned, a divorce could not be granted, and therefore the party charged with such an adultery could not be found guilty of adultery within the purview of the act, although he or she might be "guilty of adultery," within the meaning of the crimes act, or in the common acceptation of the term. I think the adultery which was characterized in the statute as a guilt, and which was to be a bar to divorce, was an adultery which was a "guilt" or offense, entitling the party injured to a divorce under the act. Chancellor Zabriskie in Jones v. Jones (1866) 18 N. J. Eq. 33, 90 Am. Dec. 607, inclined to this view of the statute; but, as the proofs in that case did not establish the commission of the offense, the decision, although of great weight, cannot be considered as controlling. That adultery condoned is not in itself an absolute bar to a divorce for subsequent adultery by the other spouse is the general doctrine of the courts where there is no express statute, and the general opinion of the leading text-writers. Anichini v. Anichini, 2 Curt. Eccl. 210 (Dr. Lushington, 1839); Cumming v. Cumming (1883) 135 Mass. 386, 46 Am. Rep. 476; Fisher v. Fisher (1901) 93 Md. 298, 48 Atl. 833. A contrary view, it is said, would permit a sort of license to commit adultery without punishment to be set up on one side by guilt on the other, however distant in point of time, or however completely forgiven or condoned. In most of the states having statute provisions, the bar of adultery by the party seeking divorce is expressly confined to cases where he or she has been guilty under such circumstances as would have entitled the opposite party to a decree, and decisions under these statutes, unless they be considered declaratory of the previous rule, do not aid in the construction of our statute. Morrell v. Morrell (N. Y. 1847) 1 Barb. 318; Eikenbury v. Burns, 33 Ind. App. 69, 70 N. E. 837; Burns' Ann. St. 1901, § 1045. If, as a matter of statutory construction, the words "guilty of adultery" are held to mean guilty of adultery punishable or actionable under the act, then the court, finding the adultery not to be within the act, has no discretion as to granting a divorce, if the guilt of the other party under the statute be proved. The statute itself prescribes the rule that is to be enforced in cases where both parties are charged with adultery, and in the absence of express provision in the statute giving a discretion to the court, in cases where both parties have in fact been guilty of adultery, it should not be exercised. It is altogether a safer and sounder practice to determine such cases by a certain rule of law prescribed by statute than by a judicial discretion based on the circumstances of each case. Cumming v. Cumming, supra. The difficulties arising under the English matrimonial causes act (St. 20 & 21 Vict. c. 85, § 31), which expressly gives discretion to the court, are pointed out by Lord Penzance in Morgan v. Morgan, 1 Law Rep. Pr. & Div. 81, 38 L. J. Rep. (N. S.) Pr. & Matr. 38 (1869), and subsequent cases, and by

Sir James Hanner in McCord v. McCord, L. R. 3 Pr. & Div. 237, 44 L. J. Rep. (N. S.) 38, 30 (1875). * * *

I will advise decree dismissing the petition and for a decree on the cross-petition.[53]

IV. General Defenses

Among the general or miscellaneous defenses may be mentioned the following: Lack of competent evidence, prematurity of suit, delay in bringing suit, lack of capacity to commit offense relied on, res judicata, and absence of the marriage relation. As to evidence, see the following references: Ordinarily the uncorroborated testimony of the party charging the offense is insufficient. True v. True, 6 Minn. 458 (Gil. 315) (1861); Cummins v. Cummins, 15 N. J. Eq. 138 (1862); Kimball v. Kimball, 13 N. H. 222 (1842); Robbins v. Robbins, 100 Mass. 150, 97 Am. Dec. 91 (1868); Jenkins v. Jenkins, 86 Ill. 340 (1877); Potter v. Potter, 75 Iowa, 211, 39 N. W. 270 (1888); Ortman v. Ortman, 92 Mich. 172, 52 N. W. 619 (1892). But see Baker v. Baker, 195 Pa. 407, 46 Atl. 96 (1900). Nor are uncorroborated confessions of guilt ordinarily sufficient to establish marital misconduct. McCulloch v. McCulloch, 8 Blackf. (Ind.) 60 (1846); Billings v. Billings, 11 Pick. (Mass.) 461 (1831); Mathews v. Mathews, 41 Tex. 331 (1874). The testimony of a particeps criminis, while admissible, is open to grave suspicion. Wahle v. Wahle, 71 Ill. 510 (1874); Simons v. Simons, 13 Tex. 468 (1855); Lewis v. Lewis, 9 Ind. 105 (1857); Ginger v. Ginger, L. R., 1 Prob. and Div. 37 (1865). It is also held that the evidence of detectives should be received with great caution. Blake v. Blake, 70 Ill. 618 (1873); Moller v. Moller, 115 N. Y. 466, 22 N. E. 169 (1889); Van Voorhis v. Van Voorhis, 94 Mich. 60, 53 N. W. 964 (1892); Winston v. Winston, 165 N. Y. 553, 59 N. E. 273 (1901). To authorize a divorce, plaintiff must be entitled at the time suit is instituted. Tourné v. Tourné, 9 La. 452 (1836). On the statute of limitations, see Stim. Am. Stat. Law, § 6223. Even aside from statutes, long delay, unless explained, will bar suit. Hitchins v. Hitchins, 140 Ill. 326, 29 N. E. 888 (1892); Stuart v. Stuart, 47 Mich. 566, 11 N. W. 388 (1882); Barker v. Barker, 63 N. J. Eq. 593, 53 Atl. 4 (1902). But delay is no bar where plaintiff is ignorant of the ground for divorce. Clark v. Clark, 97 Mass. 331 (1867). On the effect of a previous adjudication, under various circumstances, see Thurston v. Thurston, 99 Mass. 39 (1868); Haltenhof v. Haltenhof, 44 Ill. App. 135 (1891); Wagoner v. Wagoner, 76 Md. 311, 25 Atl. 338 (1892); Miller v. Miller, 150 Mass. 111, 22 N. E. 765 (1889); Nicholson v. Nicholson, 113 Ind. 131, 15 N. E. 223 (1887).

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[53] Accord: Jones v. Jones, 18 N. J. Eq. 33, 90 Am. Dec. 607 (1866); Cumming v. Cumming, 135 Mass. 386, 46 Am. Rep. 476 (1883); Wabeke v. Wabeke (Iowa) 98 N. W. 559 (1904); Talley v. Talley, 215 Pa. 281, 64 Atl. 523 (1906). Contra: Stiehr v. Stiehr, 145 Mich. 297, 108 N. W. 684 (1906), semble. In Fisher v. Fisher, 93 Md. 298, 48 Atl. 833 (1901), both were guilty of adultery, the wife condoned the husband's offense, but by his cruelty the adultery was revived; held, the condoned adultery, after revival, could be used in recrimination. For cases under the English statute, see Lloyd v. Lloyd, 84 Law T. 728 (1901); Hynes v. Hynes, 20 Times Law, 781 (1904); Shaw v. Shaw, 20 Times Law, 795 (1904); Roche v. Roche, [1905] Prob. 142; Squire v. Squire, [1905] Prob. 4.

V. Alimony

(A) Permanent

ECKER v. ECKER.

(Supreme Court of Oklahoma, 1908. 22 Okl. 873, 98 Pac. 918. 20 L. R. A. [N. S.] 421.)

Divorce by Charles L. Ecker against Della Ecker. Plaintiff had judgment for a divorce and the custody of their minor child, but it was decreed that the property should be divided equally between them, or that defendant have judgment for one-half of its value as found by the master, and from such portion of the judgment plaintiff brought error to the United States Court of Appeals of the Indian Territory, whence the cause was transferred, under the Enabling Act, to the Supreme Court of the state of Oklahoma. Reversed and remanded. * * *

Hayes, J.[54] * * * The second assignment of error urged is to that part of the master's report recommending that defendant be awarded, and to that part of the judgment awarding to defendant, one-half of plaintiff's property or one-half of its value. At common law a delinquent wife, on account of whose conduct the husband obtained a divorce, was not entitled to receive alimony, but in a number of the states, including the state of Arkansas, from which state the statutes in force in the Indian Territory were adopted, the common law has been modified by statute.

The statute governing in this case reads: "When a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable." Mansf. Dig. Ark. § 2565 (Ind. T. Ann. St. 1899, § 1853).

Under the language of this statute, or similar language of the statutes of other states, the courts have held that the authority of the court to make orders touching the alimony of the wife is not limited to those cases in which she prevails, or that whether the guilty wife will be granted alimony and the amount thereof is within the discretionary power of the court, to be controlled by the circumstances of each case. Reavis v. Reavis, 1 Scam. (Ill.) 242; Deenis v. Deenis, 79 Ill. 74; Spitler v. Spitler, 108 Ill. 120; Edwards v. Edwards, 84 Ala. 361, 3 South. 896; McDonald v. McDonald, 117 Iowa, 307, 90 N. W. 603; Reynolds v. Reynolds, 92 Mich. 104, 52 N. W. 295; Lofvander v. Lofvander, 146 Mich. 370, 109 N. W. 662; Pauly v. Pauly, 14 Okla. 1, 76 Pac. 148; Bishop on Marriage, Divorce and Separation, vol. 2, p. 865; Nelson on Divorce and Separation, vol. 2, p. 907. It is, however, a discretion that a court should at all times

[54] Part of the statement of facts and part of the opinion are omitted.

exercise with a great care, and it should not be exercised in favor of the guilty wife when there are no mitigating circumstances.

In the case at bar the wife is guilty of gross misconduct, but the husband has not been free from fault. The finding of the master is that the conduct of each party toward the other has been such as to render their living together as husband and wife intolerable. There is nothing in the master's report as to whom he finds the more culpable, except that he recommends that the husband be granted a divorce. The evidence is convincing that each has been guilty of cruel treatment of the other and gross immoral conduct, consisting of adultery with different persons. The question whether, upon the evidence in the case and the findings of the master, either party should be granted a divorce, is not before us. The part of the judgment granting a divorce has not been appealed from. The sole question is whether, the divorce having been granted to plaintiff, the court should have granted alimony to defendant.

At the time defendant married plaintiff he had but little property. During their 15 or 16 years of married life, the husband, principally through the thrift, frugality, and industry of the wife, who labored on the farm, and conducted, at different times, a boarding house, restaurants, and kept books in a grocery store, had accumulated property of the value of about $5,000. It is not clear from the record that the beginning of defendant's wrongdoing was not caused by plaintiff's cruel treatment. She is now past the meridian of her life, the greater portion of which she has spent in faithfully laboring in the discharge of her domestic duties and in contributing materially to plaintiff's accumulation of his property. Under these circumstances it is within the discretionary power of the trial court, upon granting to plaintiff a divorce, to allow defendant such alimony as under the circumstances is reasonable, just, and right, taking into consideration the amount of plaintiff's property, the extent to which defendant contributed to the accumulation thereof, the ability of each to earn money in the future, and their conduct in the past. But the court ordered an equal division of the property, or that defendant have judgment for one-half of the value of the same. This was error.

Section 2568, Mansf. Dig. Ark. (Ind. T. Ann. St. 1899, § 1856), authorizes the court upon rendering final judgment for divorce, to restore each party to all property, not disposed of at the commencement of the action, which either party obtained from or through the other or in consideration or by reason of their marriage. But none of plaintiff's property was obtained by him from or through his wife during their marriage or in consideration thereof. All the property he has is property which he had at the time of his marriage, consisting of one farm, on the purchase price of which he had paid the sum of $400, and on which there was a balance due of $800, and of a small amount of personal property, or that he acquired since their marriage with their joint earnings. Whether courts, under statutes

the same or similar to the section quoted above, have authority to decree a gross sum for alimony and maintenance of the wife is a question upon which the courts have divided, but it will serve no useful purpose to review here the two lines of authorities. The Supreme Court of Arkansas, prior to the adoption of this statute in the Indian Territory, had held in Brown v. Brown, 38 Ark. 324, that the court is without authority to decree absolutely a certain and specific sum of money, or a certain specific portion of the property, as alimony, but may decree alimony in a continuous allotment of sums, payable at regular intervals. That case is controlling in the case at bar.

The judgment of the trial court is therefore reversed, and the case remanded, for further proceedings in accordance with this opinion. All the Justices concur.[55]

SAMPSON v. SAMPSON.

(Supreme Court of Rhode Island, 1889. 16 R. I. 456, 16 Atl. 711, 3 L. R. A. 349.)

Petition to modify a decree for alimony.

PER CURIAM. The parties to this petition were formerly husband and wife, but at the March term of this court, A. D. 1885, the respondent on her petition was divorced from the petitioner, and decreed to have a separate support or alimony in the sum of thirty dol-

[55] See note to the principal case in 20 L. R. A. (N. S.) 421, collecting cases on the right of the wife to permanent alimony, where divorce is granted the husband for her fault. In some states the statutes expressly provide that alimony should be granted only when divorce is decreed for adultery or other fault of the husband. See Stim. on Am. St. Law, § 6261. In many states also statutes expressly govern the maximum amount, or provide that the amount shall be left to the discretion of the court (or jury), and a few provide that alimony may be granted only in gross. See Stim. Am. St. Law, § 6262. But if the legislature has conferred jurisdiction for divorce, the courts will decree alimony in conformity with the principles of ecclesiastical law, even where the statute is silent as to alimony. McGee v. McGee, 10 Ga. 477 (1851); Goldsmith v. Goldsmith, 6 Mich. 285 (1859); Chaires v. Chaires, 10 Fla. 308 (1863); Le Barron v. Le Barron, 35 Vt. 365 (1862). Contra: Kelley v. Kelley, 161 Mass. 111, 36 N. E. 837, 25 L. R. A. 806, 42 Am. St. Rep. 389 (1894); Wilson v. Wilson, 19 N. C. 377 (1837); Sanford v. Sanford, 2 R. I. 64 (1851). See the following cases for discussion of the various elements to be considered in fixing the amount of alimony: Stutsman v. Stutsman, 30 Ind. App. 645, 66 N. E. 908 (1903), in general; Heninger v. Heninger, 90 Va. 271, 18 S. E. 193 (1893), income from land as opposed to selling price; Elzas v. Elzas, 171 Ill. 632, 49 N. E. 717 (1898), income; Holmes v. Holmes, 29 N. J. Eq. 9 (1878), business capability; Hedrick v. Hedrick, 128 Ind. 522, 26 N. E. 768 (1891), effect of wife contributing to accumulation of property, and custody of children; Mussing v. Mussing, 104 Ill. 126 (1882), nature of husband's offense, etc.; Cottrell v. Cottrell, 74 S. W. 227, 24 Ky. Law Rep. 2417 (1903), when no alimony should be granted; Muir v. Muir, 133 Ky. 125, 92 S. W. 314 (1906), with note in 4 L. R. A. (N. S.) 909, on husband's prospects as basis for alimony. On the right of the husband to alimony, see note to Groth v. Groth, post, p. 165.

lars per month, payable in cash monthly by the petitioner. The petition prays for relief by having said order vacated or modified as his circumstances require, alleging that since his divorce he has been married again, and has become subject to expenses which make it difficult if not impossible for him to obey the order.

In Sammis v. Medbury, 14 R. I. 214, this court decided that a decree for alimony in case of a divorce a vinculo, made without reserve, is final, and cannot be changed after the expiration of the term or the time within which a new trial may be had. In that case the wife had obtained the divorce, and the decree for alimony awarded to her one-half of the rents of her husband's realty for life and one-half of his personalty, and the court decided, on his petition for a reduction presented several years afterwards, that it had no jurisdiction to grant the petition.

The decision is conclusive of the petition here, unless it can be distinguished in that the decree here is for monthly payments. The petitioner contends that the decree for alimony in such form is not authorized by the statute (Pub. St. R. I. c. 167, § 9),[56] but that under said section the court can award alimony only out of the real and personal estate which the respondent has at the time the divorce is granted. The provision has been the same at least since the Digest of 1798. It has long been the practice of the court to award alimony in the form in which it was awarded to the respondent. Several revisions of the statutes have been made since the practice has existed, and it must be presumed that the construction that has practically been given to the statute met the approval of the General Assembly, or the statute would have been changed. It is too late now to question the correctness of the construction.

Doubtless the court supposed that the words, "out of the real or personal estate of the husband or out of both," contained in said § 9, did not mean simply out of the property which the husband had when the divorce was granted, but would extend to other property subsequently acquired by him. Some such construction was necessary as a matter of the simplest justice, for otherwise a man with no present property would not be subject to alimony though he might be earning thousands of dollars every year in his business or profession.

We do not think that the fact that the alimony is awarded by allowances from month to month constitutes a distinction which would entitle us to reduce the alimony, no power to modify the award being reserved in the decree.

[56] § 9 reads as follows: "In such case the wife shall also be allowed, out of the real or personal estate of the husband or out of both, such alimony as the court shall think reasonable, not exceeding the use of one moiety of his real estate during the life of the wife, and the property of one half of his personal estate, having regard to the personal property which came to the husband by the marriage and his ability."

Of course, if the petitioner is unable to pay the monthly allowances, that is a matter which may be considered when the respondent calls upon the court to enforce payment of them.

Petition dismissed.[57]

[57] See Brown v. Brown, 31 Wash. 397, 72 Pac. 86 (1903), reported in 62 L. R. A. 974, with an extended note on the effect of a second marriage of either party upon the obligation to pay alimony. And see Savage v. Savage, 141 Fed. 346, 72 C. C. A. 494 (1905), with note in 3 L. R. A. (N. S.) 923, on the effect of a reconciliation and remarriage of the divorced parties.

"In 1892 the plaintiff obtained a decree of absolute divorce and annual alimony from the defendant. A statute passed in 1900 provides that the courts may subsequently vary decrees awarding alimony, 'whether heretofore or hereafter rendered.' N. Y. Laws, 1900, c. 742. In 1902 the defendant sought a reduction in the amount. Held, that in so far as the statute is retroactive it violates the constitutional provision against depriving a person of property without due process of law. Livingston v. Livingston, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600 (1903).

"In a decree for separation the basis of the right to permanent alimony is only the common-law right of the wife to support, for the decree does not terminate the marriage relation and the incidental property rights are not affected. Taylor v. Taylor, 93 N. C. 418, 53 Am. Rep. 460 (1885). Hence in the ecclesiastical courts the amount might be varied as the circumstances of the parties required. Cox v. Cox, 3 Add. 276 (1826). See De Blaquiere v. De Blaquiere, 3 Hagg. Ecc. 322, 329 (1830). Such a claim to alimony would not seem to constitute a vested right. Absolute divorce, on the other hand, and the rights incidental to it are purely statutory. See 1 Bl. Com. 441; 2 Bishop, Mar., Div. & Sep. § 1039. As it terminates the marriage relation the property rights incidental to that relation are entirely destroyed. Barrett v. Failing, 111 U. S. 523, 4 Sup. Ct. 598, 28 L. Ed. 505 (1884). Hence in this case the basis of the decree for permanent alimony is the loss of these property rights as well as the right to support. Calame v. Calame, 24 N. J. Eq. 440 (1874). Such a decree, like ordinary judgments, cannot subsequently be varied by the court unless at the time of divorce this power is conferred by statute or reserved in the final decree. Walker v. Walker, 155 N. Y. 77, 49 N. E. 663 (1898); Howell v. Howell, 104 Cal. 45, 37 Pac. 770, 43 Am. St. Rep. 70 (1894). In the principal case, accordingly, it would seem that the wife's interest was vested, and therefore not subject to subsequent statutory restriction." Note in 16 Harv. Law Rev. 521.

On the right to alimony where a marriage is annulled, see Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. Rep. 900 (1908), and note in 22 Harv. Law Rev. 307. On the effect of the husband's death upon a decree for alimony, see Wilson v. Hinman, 182 N. Y. 408, 75 N. E. 236, 108 Am. St. Rep. 820 (1905), reported with an extended note in 2 L. R. A. (N. S.) 232. Whether imprisonment for failure to pay alimony is a violation of the constitutional provision against imprisonment for debt, see Ex parte Davis, 101 Tex. 607, 111 S. W. 394 (1908), with note in 17 L. R. A. (N. S.) 1140. And see note in 11 Harv. Law Rev. 552.

(B) Temporary

WESTERFIELD v. WESTERFIELD.

(Court of Chancery of New Jersey, 1882. 36 N. J. Eq. 195.)

On petition, depositions and master's report.

VAN FLEET, V. C.[58] The bill in this case is filed for maintenance, under the twentieth section of the statute concerning divorces. The complainant is now before the court asking for alimony pendente lite, and counsel fees. * * *

An application for alimony pendente lite stands now solely on the ground of necessity. Originally such allowances were made, in divorce suits, almost as a matter of course. At common law, by the marriage contract, the husband acquired complete control over all property owned by his wife at the time of the marriage, or which she might acquire during coverture. In such a state of affairs, unless the court required the husband to support his wife, and to furnish her with the means of prosecuting her suit or defending his, she would be left, during the litigation, both destitute and defenceless. She was, therefore in almost all cases regarded as a privileged suitor, who had a right to call upon her adversary for both support and the means required to carry on the litigation on her part. * * *

The doctrine that a wife is not now of right, and independent of the fact that she has a sufficient separate estate, entitled to temporary alimony, is as well supported by authority as it is by reason. Chancellor Williamson, in Marker v. Marker, 11 N. J. Eq. 256, after stating the general rule that in actions for divorce the wife is a privileged suitor and entitled to counsel fees and alimony, says: "The rule originally rested upon the principle that the husband having by the marriage contract the control of the wife's property, she was destitute of the means of her own protection. The statute has changed the common law, and secures to the wife the ownership and disposition of property she may have at her marriage or may acquire afterwards. When the wife is a suitor in court, the question will be, whether she has property independent of her husband, and the court will exercise its discretion in the allowance of alimony and costs, having reference to the respective pecuniary circumstances of the husband and wife." Mr. Bishop, in the second volume of his treatise on Marriage and Divorce, at section 394, says: "When the wife has sufficient separate property, the reason for giving her either temporary alimony, or money to defray her expenses in the suit, does not exist, and she is not entitled to either." And Judge Rapallo, in delivering the judgment of the court of appeals of New York, in a recent case, says: "If the wife has sufficient means of her own, temporary alimony is not allowable. * * * The fact that a wife is destitute of means to

[58] The opinion is slightly abridged.

carry on her suit and to support herself during its pendency, is as essential as any other fact, to authorize the court to award temporary alimony. This is not a mere matter of discretion, but a settled principle of equity." Collins v. Collins, 80 N. Y. 1.

It is plain, I think, if the rule just stated is applied, that this application must be denied. The wife has nearly three times the income her husband has. Her income is quite sufficient to afford her a comfortable support, and also to pay such legal expenses as it will be necessary for her to incur in the prosecution of her suit. There is, therefore, no necessity whatever that she should have additional aid. * * * The application must be denied.[59]

GROTH v. GROTH.

(Appellate Court of Illinois, 1896. 69 Ill. App. 68.)

GARY, J. The appellant filed a bill to obtain a divorce from the appellee. The court ordered that she should pay him $20 per month, temporary alimony, and $25 solicitor's fees, from which order is this appeal. We do not review the cause shown on which such order was made, being of the opinion that if alimony from a wife to a husband is a proper thing upon circumstances, legislation is necessary to authorize it. At common law a husband was required to provide his wife with necessaries, but there was no reciprocal duty.

The statute gives her—not him—alimony. To give it to him is not to administer existing, but to make new, law. Somers v. Somers, 39 Kan. 132, 17 Pac. 841; Greene v. Greene, 49 Neb. 546, 68 N. W. 947, 34 L. R. A. 110, 59 Am. St. Rep. 560. The order is reversed.[60]

[59] See 2 Bishop, Mar., Div. & Sep. §§ 930, 931, and in general, on temporary alimony, §§ 907–965.

[60] The decision in the Circuit Court is reported in 7 Chicago Law Journal, 360. The court laid stress on the Illinois statute, making a married woman equally liable with her husband for necessaries furnished to the family, provided she has a separate estate. That alimony is limited to the wife has been generally assumed by definition of the term. See accord: Somers v. Somers, 39 Kan. 132, 17 Pac. 841 (1888). On the right of a husband to recover back property held by his wife, in connection with a suit for divorce, see note to Greene v. Greene, 49 Neb. 546, 68 N. W. 947, 59 Am. St. Rep. 560 (1896), in 34 L. R. A. 110, and note in 25 Harv. Law Rev. 556 (1912), discussing Hagert v. Hagert (N. D.) 133 N. W. 1035 (1911). In Hagert v. Hagert, supra, the husband obtained a decree for support, under a statute requiring the wife to support the husband out of her separate property where he is unable, by reason of infirmity, to support himself. No remedy was named by the statute. Held, that the practice should be in analogy to proceedings for alimony in a suit for divorce. The court did not seem to regard the statute as necessary to its decision.

VROOM v. MARSH.

(Court of Chancery of New Jersey, 1878. 29 N. J. Eq. 15.)

Bill for decree annulling marriage. On petition for temporary alimony and counsel fee.

THE CHANCELLOR. This is an application for alimony pendente lite and counsel fee. The complainant files his bill for a decree annulling the marriage between him and the defendant. He, of course, admits a marriage de facto. He alleges that he was compelled, by duress, to enter into the contract. The fact that he is before this court denying the validity of the marriage, and in this proceeding seeking to annul it, is not, of itself, enough to relieve him from the support of the defendant pendente lite; for, as before stated, he admits that there was a de facto marriage, which is still subsisting. North v. North, 1 Barb. Ch. (N. Y.) 241, 43 Am. Dec. 778. The defendant, by her answer, denies any participation in, or knowledge of, the alleged duress, or of the existence of it; but declares that she understood at the time that the marriage was wholly voluntary on the part of the complainant. There will be an allowance of five dollars a week for ad interim alimony, with a counsel fee of one hundred dollars.[61]

(C) Alimony Unconnected with Divorce

1 Bish. Mar., Sep. & Div. § 1388: "By the English doctrine, followed in most of our states, alimony has no independent existence. Only as an appendage to some other proceeding—as, commonly, for a divorce—is it known in any department of the unwritten law; no court, not even the ecclesiastical, being authorized to grant it when it is the only relief sought." From § 1393: "Wisely and well our judiciary has unanimously decided, after thinking, that the mere nonexistence of ecclesiastical courts with us does not empower our equity tribunals to take up and exercise their divorce jurisdiction. Yet the rejected doctrine that it does, changed in a way to deprive it even of the semblance of reason, happens to have been long ago put forth by somebody as law, whereupon numbers of our tribunals adopted and are now following it, namely, that, because we have no ecclesiastical courts, our equity tribunals may take their jurisdiction to grant, not divorce, but alimony, in oblivion of the fatal truth that those courts never had or claimed the authority to award alimony, except as an incident to the divorce which admittedly is not within the jurisdiction of equity." See, to the same effect, Pom. Eq. Jur. (3d Ed.) § 1120. See note in 21 L. R. A. 677 (1893), on suit for alimony after decree of divorce; note to Jones v. Brinsmade, 183 N. Y. 258, 76 N. E. 22, 111 Am. St. Rep. 746, 5 Ann. Cas.

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[61] On the right to alimony, where the husband denies the marriage, see Bish. Mar., Div. & Sep. §§ 922–928, and notes in 13 Harv. Law Rev. 224, and 19 Harv. Law Rev. 385. Whether the wife, who has been divorced without alimony, is entitled to temporary alimony in an independent suit to have the divorce set aside for fraud, see Chapman v. Parsons, 66 W. Va. 307, 66 S. E. 461, 135 Am. St. Rep. 1033, 19 Ann. Cas. 453 (1909), reported with note in 24 L. R. A. (N. S.) 1015.

378 (1905), in 3 L. R. A. (N. S.) 192, on allowance of alimony in suits to annul the marriage, and note in 25 Harv. Law Rev. 391 (1912). But in many states statutes provide for alimony unconnected with divorce. Stim. Am. Stat. Law, §§ 6351, 6154, 6280, 6311.

VI. Effect of Divorce

KENT v. McCANN.

(Appellate Court of Illinois, 1893. 52 Ill. App. 305.)

The opinion states the case.

Boggs, P. J.[62] Delia McCann, the appellee, and Patrick McCann, intermarried February 15, 1871.

They were divorced by a decree of the Circuit Court of Champaign County, Illinois, March 15, 1882, on the petition of the wife, for the fault and wrong of the husband, the specific ground being that he had been guilty of acts of extreme and repeated cruelty to the wife. Neither of the parties afterward remarried. Patrick McCann died November 16, 1890, testate. His will disposed of his property, real and personal, without reference to the appellee. The appellant, Thomas Kent, was appointed administrator with the will annexed, of the estate. This was a bill in chancery filed by Delia McCann against the heirs, devisees and legatees of the testator and also against the appellant as administrator.

The prayer of the bill is that dower be assigned the appellee in the lands of which the deceased died seized, and for a decree awarding her one-third of the personal estate after the payment of debts and costs of administration. The Circuit Court awarded the relief prayed for and by this appeal the administrator questions the correctness of so much of the decree as directs the payment to the appellee of one-third of the personalty.

The decree of divorce was a vinculo matrimonii. No other divorce is authorized by our statute. Clarke v. Lott, 11 Ill. 105. At the common law a decree a vinculo matrimonii absolutely dissolved all marriage ties and destroyed the relation of husband and wife. 5 Amer. & Eng. Ency. of Law, page 839.

Such a divorce terminated at the common law the right of the wife to dower, because it was essential to dower that the marriage should subsist at the death of the husband. Scribner on Dower, vol. 2, c. 19, §§ 1, 2 and 13; Cord, Rights of Married Women, vol. 1, § 488, h.

This rule of the common law has, however, been modified in our state by the enactment of § 14, c. 41, R. S., entitled "Dower," which is as follows: "If any husband or wife is divorced for the fault or misconduct of the other, except where the marriage was void

[62] The opinion is abridged.

from the beginning, he or she shall not thereby lose dower, nor the benefit of any jointure; but if such divorce shall be for his or her fault or misconduct, such dower or jointure, and any estate granted by the laws of this state in the real and personal estate of the other, shall be forfeited." The effect of this enactment is to preserve to the wife her right to dower in case she is granted a divorce from the husband for his fault.

The appellee was divorced for the fault of her husband and is entitled to the benefit of the change effected by the statute, which is that she did not by the divorce lose her right to dower. * * * Counsel for appellee, however, insist that the law in Illinois is that "whatever a surviving wife takes of the estate of the husband, she takes as dower, and not as heir or next of kin."

It is not necessary that we discuss that proposition for the reason that the appellee was not the surviving wife of Patrick McCann, the deceased. After the decree of divorce Patrick McCann had no wife, and the appellee had no husband, nor could the survivor be regarded as the widow or widower of the other. Jordan v. Clark, 81 Ill. 465; Bishop on Marriage and Divorce, vol. 2, §§ 1628 and 1629; 5 Amer. and Eng. Ency. of Law, 839, and cases cited, note 1, page 840. She never became his widow, and therefore did not become entitled to rights which the statutes give to a widow. Bishop on Marriage and Divorce, supra, and many cited in note 1 to § 1628.

After the divorce she had no interest in his personal property as his wife, because she was not his wife, but they to all legal intents, as to such property, were as strangers; each being free to lawfully contract new marriage relations and become husband or wife to other parties. The statute preserved to her dower in such lands as he was seized of during coverture with her, but aside from this all other interest in his property terminated with and was destroyed by the divorce, together with the relation of husband and wife. * * *

We are clearly of the opinion that with the dissolution of the marriage tie appellee lost all interest in the property then owned by him who had been her husband, and in all property he might thereafter acquire, except that by force of the statute she retained a dower interest in such lands as belonged to him during the existence of the marriage.

Not being the widow of the deceased she was not entitled to a decree against the appellant, Kent, as his administrator, for the share in the personal estate of the deceased, which the law vested only in his widow.

The decree must be, and as to the appellant, Kent, administrator, is, reversed.[63]

[63] See, also, In re Estate of Ensign, 103 N. Y. 284, 8 N. E. 544, 57 Am. Rep. 717 (1886); Adams v. Storey, 135 Ill. 448, 26 N. E. 582, 25 Am. St. Rep. 392 (1890), reported in 11 L. R. A. 790, with note on the effect of absolute divorce on the rights of husband and wife. Compare Overhiser v. Mutual Life Insur-

SECTION 2.—LEGISLATIVE DIVORCE

Legislative divorces, being entirely distinct from judicial divorces, are here referred to; but, since they involve wholly questions of constitutional law, and are fully discussed in courses in constitutional law, it has been thought best not to report the cases here. Although their validity was established by the weight of authority (Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654 [1888]) they have diminished in public favor and many state constitutions now prohibit them. Stim. Am. Stat. Law, §§ 395, 430. See Maynard v. Hill, in Hall's Cases on Constitutional Law in the American Casebook Series, p. —, and Jones v. Jones, 95 Ala. 443, 11 South. 11 (1892), reported in 18 L. R. A. 95, with a note on the validity of legislative divorce.

SECTION 3.—SEPARATION AGREEMENTS

COLLINS v. COLLINS.

(Supreme Court of North Carolina, 1867. 62 N. C. 153, 93 Am. Dec. 606.)

READE, J.[64] It is to be considered for the first time, whether a deed of separation between husband and wife, will be enforced in this court.

The relation of husband and wife is at the foundation of society. It is natural, as well as conventional. It was the relation of the first pair of our race, and has existed ever since. It is universal in civilization, and not uncommon in barbarism. It is indispensable to that other important relation of parents and children. Incident to it are its inseparable and indissoluble characteristics—its oneness—"they shall be no longer twain but one flesh," "to live together after God's holy ordinance," "so long as they both shall live." But little legislation is necessary to define and regulate it. We know it by intuition. It is induced by the strongest passion of the human soul, love. It is the most endeared relation which nature makes, or society forms. When lusts entice, or wealth prompts the relation, it may

ance Co., 63 Ohio St. 77, 57 N. E. 965, 81 Am. St. Rep. 612 (1900), reported in 50 L. R. A. 552, with note on divorce as affecting wife's right to insurance upon her husband's life; In re Estate of Jones, 211 Pa. 364, 60 Atl. 915, 107 Am. St. Rep. 581, 3 Ann. Cas. 221 (1905), reported in 69 L. R. A. 940, with note on effect of divorce to revoke gift by will. For statutes on the effect of divorce, see Stim. Am. Stat. Law, §§ 6240–6254, 6300–6310.

[64] This was a petition for dower, stating death of the husband of petitioner, seisin of the land described, that husband and wife had lived apart, after signing articles of separation, by which the wife agreed to accept a certain sum secured by bond in lieu of dower. The defendant filed a general demurrer, and the case was transferred to this court by consent. The statement of facts is omitted and the opinion is slightly abridged.

prove a curse when the one is satiated and the other wasted; but when love, virtuous and disinterested, ardent and mutual, prompts the relation, it is incomparable. Such is the relation as it exists with us. It is formed in perfect freedom. There are no constraints of parents, of custom or of laws; nor any influences but such as are conducive to its happiness. It is formed in perfect simplicity, and preserved in religious purity. The husband is the stronger, and rules as of right; the wife is the weaker, and submits in gentleness. The frailties of each are excused or forgiven; their sentiments are in unison; their manners in conformity; their interests the same; their joys and sorrows mutual; their children are a common bond, and a common care; and they live, not separately, but, together—the nursery of morality and piety; and the bulwarks of society.

How different from this is marriage, quarrel, separation!—the anomalous condition of a husband without a wife, a wife without a husband, parents without children, and children without parents! Such relations too surely follow deeds of separation. Let it be understood that marriage is only an experiment, to be formed inconsiderately, and broken capriciously; to be put on and off like a garment; that husband and wife may have separate establishments, in which to nurse their hate, and cover their irregularities; that children may be trained to hate one parent or both, and to have the care of neither; and society to have constantly in view the nuisance of their infidelities; and what greater evil can be imagined.

It is to be admitted, that in some of the old governments, passions and vices have fixed this evil upon society. It was unknown to the common law. Roper, in his treatise on Husband and Wife (2d vol. p. 267), says: "This kind of separation is the offspring of late years, and totally unknown to the common law; and the observation must be repeated, that, as in the other innovations upon that law, so in this instance, the legal acknowledgment of this species of divorce has introduced in the administration of justice considerable difficulties and perplexities. According to the original policy of England, the Ecclesiastical Courts had exclusive jurisdiction of the rights and duties arising from the state of marriage, and they acknowledged no such kind of divorce as that under consideration. They did not permit the parties, by voluntary compact, to alter those rights and duties, and in so doing they prevented those anomalous cases which have occurred since the establishment of the doctrine in courts of law and equity, that a separation in pais is in effect valid, and that while it continues, the wife is to be considered, in most respects, as a feme sole."

Since this evil has attached to English society, learned Judges have strongly condemned it; but too much property now depends upon it to disturb it. * * *

If there were any doubt as to our policy it would seem to be clearly settled by our legislation. Important as the relation is, our whole

legislation is comprised in a few pages of the Revised Code. It provides that marriage shall be indissoluble except for impotency at the time of marriage, or subsequent infidelity. It allows separation only where the wife's condition is intolerable, or life burdensome. And it allows separate support only where the husband is a drunkard or spendthrift, and is wasting his substance to the impoverishment of his family. And in all these cases the parties are not allowed to be the judges; but they must make application to court, and so far from their consent availing anything, there must be satisfactory proof that there has been no collusion or concert; and if for divorce, that it is not for the mere purpose of being freed and separated from each other—observe, separated from each other.

In contravention of this policy, and in disregard of their marriage vows, the parties in this case had "difficulties" and separated; and to avoid the wholesome control of the court, they entered into an agreement by which the property was to be divided between them, and each relinquished to the other all the marriage privileges and responsibilities, and were to live separately. Such a course, if allowed, would virtually annul our marriage laws, and make the relation of husband and wife a mere trade or bargain, dependent upon their caprice. It is true that the courts will not compel them to live together; but it is equally true that they will afford them no encouragement to separate, except in those cases provided by law.

Thus much may be said where the separation is voluntary with both parties; but if allowed, it would open the door to fraud and imposition by one, to compel a separation and settlement on the part of the other. An imperious husband, secure from exposure in the courts, would practice cruelties toward a faultless wife, to compel a separation; and she, to buy her peace, would take such terms as he might offer.

We do not know the facts of this case, except that it seems that the wife was induced to take less than she is now satisfied with, or than the law allows her.

We do not, however, put the case upon the ground of fraud or imposition on the part of the husband, but upon the broad ground that articles of separation between husband and wife, voluntarily entered into by them, either in contemplation of or after separation, are against law and public policy, and will not be enforced in this court.

The demurrer is overruled with costs.

Per Curiam. Demurrer overruled.[65]

[65] But see Sparks v. Sparks, 94 N. C. 527 (1886). In Foote v. Nickerson, 70 N. H. 496, 48 Atl. 1088, 54 L. R. A. 554 (1901), a separation agreement was held void as contrary to public policy. See case for an extended discussion of the English and American authorities. See, also, an article entitled "Separation Agreements under English Law," by R. J. Peaslee, in 15 Harv. Law Rev. 638.

COMMONWEALTH v. RICHARDS.

(Supreme Court of Pennsylvania, 1890. 131 Pa. 209, 18 Atl. 1007.)

CLARK, J.[66] This is a proceeding under the act of April 13, 1867 (P. L. 78), brought by Emma Richards against her husband, Thomas Richards, to obtain an order upon him for her maintenance and support. The complaint is that on September 20, 1887, the defendant, residing in Allegheny City, "did then and there, without any cause or provocation, desert and abandon" his wife and since that day "has failed and refused to provide anything toward her support and maintenance." At the trial in the Quarter Sessions the defendant offered in evidence a deed of voluntary separation dated March 11, 1886, by the terms of which the parties, "in view of divers disputes and unhappy differences" which had arisen between them, had consented and agreed to live separate and apart from each other during their natural lives, etc. The husband agreed to, and actually did, place in the hands of his wife, "towards her better support and maintenance," the sum of $50 in cash, household goods to the amount of $100, and four shares of stock in the Co-operative Foundry of Beaver Falls, Pa., of the par value of $100 each. In consideration thereof the wife agreed to discharge the said Thomas Richards, his heirs and assigns, and his estate, from all claims, etc.; the husband to have the custody of their child, William Emmett, etc. The question as to the effect of these articles of separation is brought upon the record by a formal bill of exceptions, and, as no question is raised as to the disposition of the case on a certiorari, we will consider it as the parties have presented it.

That a valid agreement may be made for separation between a husband and wife, and for an allowance for her support, where the separation is inevitable and immediate, is now too well settled to admit of discussion or require a citation of authorities. The validity of such covenants, although exceptional in their status, has been established by repeated decisions of this court. Ordinarily these agreements, as in Dillinger's Appeal, 35 Pa. 357, have been carried into effect through the medium of a trustee; but the undoubted weight of authority is that there may be a valid agreement for the separation directly between husband and wife, without the intervention of a trustee, which the courts will sanction. Hutton v. Hutton, 3 Pa. 100; Smith v. Knowles, 2 Grant, Cas. 413; Hitner's Appeal, 54 Pa. 110; Garver v. Miller, 16 Ohio St. 527; Randall v. Randall, 37 Mich. 563; Dutton v. Dutton, 30 Ind. 452. In such cases the husband himself will be treated as a trustee for the specific purpose in view, and will be held accordingly. If the object of the agreement is actual and immediate, if the terms are reasonable, and it is actually carried into effect by both parties in good faith, it will be as binding upon the wife as upon her husband.

[66] Only the opinion is given. **It sufficiently states the facts.**

In the case at bar, we do not understand that there is any allegation of fraud or unfairness, or that the terms of the deed of separation were, in any respect, unreasonable. How, then, under such circumstances, can the husband, upon the complaint of the wife, be convicted of a crime in failing to do what he was under no legal obligation to do? Can his wife, after having by a formal deed bound him to permit her to live separate and alone, and absolved him from her maintenance, immediately thereafter enter a criminal complaint, and procure his arrest and conviction, for doing what she had bound him both in law and in equity to do? The proceedings are not under the act of 1836, but under the act of 1867; they are instituted by the wife, not by the children or by the overseers of the poor; and it is difficult to see how the wife, in such case, could at the same time hold her husband to perform the articles, and convict him of a crime for doing so. The absurdity of such a result is apparent. If the prosecution were in behalf of the children, or by the overseers of the poor, a question would be presented which it is not necessary now to discuss. Certainly a husband, as between himself and his wife, cannot be said to have separated himself from her without reasonable cause, when she has by deed placed him under legal obligation "not to visit her, or to enter any house where she may happen to be," and "to permit her to live separate from him," and to carry on business on her own account as if she were a feme sole.

If a proper provision has been made for a wife, her husband is not liable even for necessaries furnished for her support. Cany v. Patton, 2 Ashm. 140; Alley v. Winn, 134 Mass. 77, 45 Am. Rep. 297. And a party dealing with a married woman, known to be living apart from her husband, is put upon inquiry as to the cause of the separation. If this be so, for much stronger reasons will the husband, under such circumstances, be relieved from a criminal prosecution, instituted by the wife herself, to obtain an order for her maintenance.

If the deed of separation was fraudulently procured and the terms were unreasonable, or if after its execution it had become null and void by the acts of the parties, these facts should have been shown; but, standing upon the deed alone, the conviction was unwarranted by the proofs, and must be set aside.

The judgment is therefore reversed, and a procedendo awarded.

ASPINWALL v. ASPINWALL.

(Court of Errors and Appeals of New Jersey, 1892. 49 N. J. Eq. 202, 24 Atl. 926.)

On appeal from a decree advised by Vice Chancellor Bird.

BEASLEY, C. J. This bill has its footing in articles of agreement between a husband and wife providing for a separation. That instrument is exhibited by the complainant, and is to the effect following,

to wit: That the husband will permit the wife during her life to live separate from him and to carry on a separate business, and that he will not reclaim or molest her; and, further, that he will pay to her during her life, for the support of herself and her two children, of whom she is to have the custody, the sum of $8 per week. To the performance of these stipulations the husband binds himself to his said wife, and to her trustee, who is a party to articles but who on his part does not enter into any covenant whatever. The agreements in favor of the husband made by the wife are that she will accept the designated weekly allowance "in full satisfaction for her support and maintenance, and for the support and maintenance of their said two children, and of all alimony during her coverture," and that she will not prevent the children from visiting or being visited by their father at proper times.

The prayer of the bill is that the husband shall be compelled to "specifically perform said articles of agreement, and especially that he do pay" the weekly sum stipulated for.

The husband, in his answer, admits the separation and the execution of the articles, and, in substance, sets up, by way of defence, that the wife violated her agreement with respect to his intercourse with his children; that she unreasonably hindered his and their interviews.

Upon these pleadings and the proofs taken the decision was in favor of the complainant, and three things were decreed, namely, first, that the articles of separation should be specifically performed; second, that the moneys stipulated for should be paid by the husband for the use of the wife, together with her costs; and, third, that the husband should have the right to visit his children in a certain mode and at specified times.

With respect to the mandate that the moneys and costs in question should be paid for the use of the complainant, this court is of opinion that the decree before us should in all respects be affirmed. These stipulations for the support of the wife, who is living separate from her husband with his assent, have always been regarded as enforceable in a court of equity in this state. This is plainly manifest from the decisions presently to be cited on another branch of our inquiry. And it would be singular indeed if the court should refuse to carry into effect stipulations of this character, for as there is nothing illegal in the fact of husband and wife living apart by mutual assent, and inasmuch as under such conditions the husband would be liable for the maintenance of the wife, it is difficult to see why equity should not enforce the payment of the sum of money that both parties have agreed to be a reasonable amount for that end. But it is not at all necessary either to labor or to elucidate the point, for the right to equitable relief by force of agreements of this character is regarded as res adjudicata.

Nor do we think that the objection that inasmuch as there is no covenant in these articles by the trustee for the benefit of the husband, therefore the stipulation to make the allowance to the wife is devoid of consideration should prevail. It is no doubt usual in these cases for the trustee to covenant with the husband to save him harmless from the debts contracted by the wife, and such covenants in some of the decisions have been referred to as the legal support of the husband's contract. But it seems plain that such a covenant would, as things are now circumstanced by the law of this state, be of no efficacy whatever. By force of our statutes a married woman can contract in her own name, but her husband cannot be affected by such conduct, so that, when living by his assent in a state of separation from him, it does not seem possible for her to put him to trouble by reason of her debts. In this case the wife agreed to live separate from her husband, and while so living to accept a certain weekly sum wherewith to support herself and children, and that stipulation she has fulfilled and the husband has received the benefit of such execution, and during the running of such contract has been absolved from all liability for the debts of his wife. In such a situation as this an agreement on the part of the trustee to indemnify the husband in this particular would add, in substance, nothing to the security of the latter. We think the contract of this appellant to pay the moneys in question rested on a sufficient consideration, and that such contract in this respect is properly enforced in the decree before us.

As to that other part of this decree which directs the articles of separation to be specifically performed, we think that so far forth it must be reversed. The doctrine that a court of equity will not aid to carry into effect an agreed separation between married persons has always been regarded as the law of this state. The doctrine was considered as settled law more than half a century ago, for, prior to the year 1831, Governor Williamson, sitting as chancellor, dealing with this subject, in the case of Melony v. Melony, thus strongly expressed his conviction: "I am clearly of opinion that the agreement between parties to live in a state of separation cannot be recognized in this court as valid, and that such agreement is a direct contravention of the marriage contract. It is contrary to sound policy as well as morality that the parties who have entered into the marriage state should be permitted to separate, and agree that they will live in a state of separation and free from the obligations imposed on them by the marriage. The marriage contract cannot be annulled and cancelled, nor the parties absolved from their obligations under it by their private agreement." 1 N. J. Eq. 391.

In the case of Emery v. Neighbour, 7 N. J. Law, 151, 11 Am. Dec. 541, we find a similar expression of this equitable rule, which is reiterated in Calame v. Calame, 25 N. J. Eq. 552.

The result is, that whatever may be the recent perturbations of

opinion on this subject so remarkably exhibited by the English Courts, we think that in this state the principle in question is so conclusively settled as not to be open to discussion. Married persons may agree to live apart and they may carry out such purpose, but the obligation to fulfill such contract is imperfect, for it will not be judicially enforced.

The decree before us, therefore, must be reversed so far as it directs these articles of separation to be in general specifically performed.

Nor can the third branch of this decree be sustained. It appoints the times and methods for the communication between the appellant and his children, but such affirmative relief cannot be given without a cross-bill, or an answer in the nature of one. The pleadings do not raise the question thus decided, and, consequently, the decree in this particular, is a mere interpolation.

Let the decree of this court be entered in accordance with the foregoing views. The respondent is entitled to her costs, both on this appeal and in the court below.[67]

For affirmance—None.

For reversal—The Chief Justice, Depue, Dixon, Garrison, Magie, Reed, Van Syckel, Werts, Bogert, Brown, Smith, Whitaker—12.

[67] In a note to Hill v. Hill, 74 N. H. 288, 67 Atl. 406, 124 Am. St. Rep. 966 (1907), in 12 L. R. A. (N. S.) 848, the cases are collected on all the points involved in the three preceding cases. A portion of the summary is here quoted: "It is now well settled law, with the exception of New Hampshire, and possibly North Carolina, in both the United States and England, that agreements for separation are valid and enforceable so far as property rights therein are concerned. The early English cases were contra, but they have long since been overruled. No case, however, has been found, in which the specific separation of the parties has been decreed, and, while there is some scant English authority where this provision seems to have been enforced, no case in the United States has been disclosed where such a holding was made. A conflict still exists as to the necessity of a trustee." In one or two states a voluntary separation for five years is made a ground for divorce. Stim. Am. Stat. Law, § 6212.

INDEX

[THE FIGURES REFER TO PAGES]

ACTION,
survival of, for breach of promise, 28, 29, note.

ADULTERY,
as ground for divorce, 109–116.

AGE TO MARRY, 48–53.

AGREEMENT TO SEPARATE, 169–176.

ALIMONY,
effect of husband's death upon a decree for, 163, note.
imprisonment for failure to pay, 163, note.
on annulment of marriage, 163, note.
permanent, 159–163.
temporary, 164–166.
unconnected with divorce, 166, note.
where husband denies marriage, 166, note.

BIGAMY,
as affected by common-law marriage, 37, note.
where first marriage proved by habit and repute, 43, note.

BREACH OF PROMISE,
accrual of right to sue, 30, 31, note.
damages, 29–31, note.
defenses,
disease, 28, 29, note.
fraud, 27–29, note.
illegal consideration, 23–26.
insanity, 26, 27.
prior subsisting marriage, 16–23.
statute of frauds, 5–12.
statute of limitations, 30, 31, note.
historical, 1–5.
proof of promise, 5–15.
survival of action, 28, 29, note.

COLLUSION,
as defense in suit for divorce, 142–145.

COMMON-LAW MARRIAGE, 32–48.

CONDONATION,
as defense in suit for divorce, 148–153.

CONNIVANCE,
as defense in suit for divorce, 145–147.

CONSANGUINITY,
as ground for annulling marriage, 58–63.

CONSUMMATION,
effect of, in suits for annulling marriage, 81, note.

CRUELTY,
as ground for divorce, 116–125.

DAMAGES,
in suits for breach of promise, 29, 30, note.

[The figures refer to pages]

DEFENSES,
general, in divorce suit, 158, note.
special, in divorce suit,
collusion, 142–145.
condonation, 148–153.
connivance, 145–147.
recrimination, 153–158.

DESERTION,
as ground for divorce, 125–138.

DISEASE,
concealment of, as ground for annulling marriage, 81, note.

DIVORCE,
alimony,
effect of husband's death upon a decree for, 163, note.
imprisonment for failure to pay, 163, note.
on annulment of marriage, 163, note.
permanent, 159–163.
temporary, 164–166.
unconnected with divorce, 166, note.
where husband denies marriage, 166, note.
defenses,
general, 158, note.
special,
collusion, 142–145.
condonation, 148–153.
connivance, 145–147.
recrimination, 153–158.
effect of divorce, 167–169.
evidence, 158, note.
grounds for divorce,
adultery, 109–116.
cruelty, 116–125.
desertion, 125–138.
imprisonment, 138–141.
miscellaneous, 141, 142.
jurisdiction, 95–108.
legislative divorce, 169, note.
statute of limitations, 158, note.

DRUG HABIT,
as ground for divorce, 141, note.

DURESS,
as ground for annulling marriage, 88–90.

EQUITY,
power of court of, to annul marriage in absence of statute, 90, note.

EVIDENCE,
in suit for divorce, 158, note.

FRAUD,
as defense in breach of promise suit, 27–29, note.
as ground for annulling marriage, 72–88.

FRAUDS, STATUTE OF, 5–12.

IMPOTENCE,
as ground for divorce, 141, note.

IMPRISONMENT,
as ground for divorce, 138–141.
for failure to pay alimony, 163, note.

INSANITY,
as ground for annulling marriage, 53–58.
as ground for divorce, 141, note.
INTOXICATION,
as ground for annulling marriage, 56, note.
as ground for divorce, 141, note.

JEST,
marriage in, 90, note.
JURISDICTION,
in suits for divorce, 95–108.
of court of equity to annul marriage in absence of statute, 90, note.

LEGISLATIVE DIVORCE, 169, note.
LIMITATIONS, STATUTE OF,
in suits for breach of promise, 30, 31, note.
in suits for divorce, 158, note.

MARRIAGE, 1–94.
annulment,
after death of one party, 90, note.
effect of consummation, 81, note.
grounds for annulment,
disease, concealment of, 81, note.
duress, 88–90.
fraud, 72–88.
intoxication, 56, note.
insanity, 53–58.
jest, marriage in, 90, note.
mistake, 88–90.
non-age, 48–53.
physical disability, 38, note.
prior subsisting marriage, 63–72.
relationship, 58–63.
jurisdiction of court of equity to annul in absence of statute, 90, note.
breach of promise,
accrual of right to sue, 30, 31, note.
damages, 29–31, note.
defenses,
disease, 28, 29, note.
fraud, 27–29, note.
illegal consideration, 23–26.
insanity, 26, 27.
prior subsisting marriage, 16–23.
statute of frauds, 5–12.
statute of limitations, 30, 31, note.
proof of promise, 5–15.
survival of action, 28, 29, note.
common-law marriage, 32–48.
statutes abolishing, 47, 48, note.
nature of marriage relation, 31, 32.
slave marriage, 37, note.
uniform marriage law, a proposed, 91–94.
MISTAKE,
as ground for annulling marriage, 88–90.

NON-AGE,
as ground for annulling marriage, 48–53.

PARDON,
effect of, on imprisonment as ground for divorce, 139 141.

[The figures refer to pages]

PHYSICAL DISABILITY,
as ground for annulling marriage, 38, note.

PROOF,
of promise to marry, 5–15.

RECRIMINATION,
as defense in suit for divorce, 153–158.

RELATIONSHIP,
as ground for annulling marriage, 58–63.

SEPARATION AGREEMENTS, 169–176.

SLAVES,
marriage of, 37, note.

STATUTES,
abolishing common-law marriage, 47, 48, note.
California,
Civ. Code, sec. 55. 32.
England,
26 Geo. II, c. 33, sec. 13. 1.
25 Hen. VIII, c. 22, secs. 3, 4. 58. 59.
frauds, statute of,
in suits for breach of promise, 5–12.
Illinois,
Laws, 1843, p. 155, sec. 1, 59.
Laws, 1887, p. 225. 59.
Hurd's Rev. Stat. 1909, c. 40, sec. 1, 108, 109.
Hurd's Rev. Stat. 1909, c. 40, sec. 2, 95.
Indiana,
Burns' Ann. Stat. 1908, sec. 7289, 32.
limitations, statute of,
in suits for breach of promise, 30, 31, note.
in suits for divorce, 158, note.
Massachusetts,
Rev. Laws, 1902, c. 152, secs. 1, 2, 108.
Rev. Laws, 1902, c. 152, secs. 4, 5, 95, 96.
New York,
Code Civ. Proc. sec. 1756, 95.
Consol. Laws, 1909, c. 14, sec. 5, 59
Consol Laws, 1909, c. 14, sec. 7, 48.
Consol. Laws, 1909, c. 14, sec. 10, 31.
uniform marriage law, a proposed, 91–94.

SURVIVAL OF ACTION,
for breach of promise, 28, 29, note.

UNIFORM MARRIAGE LAW,
a proposed, 91–94.

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